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No. _____

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

SALLY B. KIRMAN and JOHN G. KIRMAN,
Petitioners,

vs.

COMPAGNIE FRANCAISE DE CROISIERES,
Respondent.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division Three

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a foreign cruise line carrier of a foreign flagged vessel can invoke federal maritime choice of law principles under *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and its progeny to achieve liability limitations under a foreign convention in claims brought by its American cruise passengers, when the cruise passage contract, issued and purchased in the United States, states that it applies to all claims against the carrier, sounding in tort or in contract, and affirmatively addresses "Liability Limitations," but does not communicate the asserted liability limitation, foreign law or convention, or contain any reference to laws or currency other than to those of the United States.

2. Whether the omission of an affirmative choice of law clause in a cruise passage contract issued in the United States, for purchase by United States citizens, relieves a cruise carrier from compliance with the federal maritime law principle that all liability limitations and limiting conditions that a carrier intends to invoke against its passengers must be "reasonably communicated" in the contract of passage.

3. Whether federal maritime law and policy sanction application of traditional federal maritime choice of law principles under *Lauritzen* and its progeny in tort claims by American cruise passengers against a carrier when to do so renders the carrier-passenger relationship and the contract of passage irrelevant.

LIST OF PARTIES

Petitioners are Sally B. Kirman and John G. Kirman.

Respondent is Compagnie Française de Croisieres ("CFC"), a French corporation, with its principal place of business in Paris, France. At the time of the subject incident in 1991, CFC was owned by two French corporations, and its officers and directors were French. There were no United States ownership interests in CFC. CFC is presently owned by Costa Crociere SpA, an Italian company with its principal place of business in Geneva, Switzerland. CFC no longer has any subsidiaries, wholly owned or nonwholly owned.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The Order of the California Supreme Court dated May 21, 1997, summarily denying the Kirmans' petition for review is not reported and is reproduced at page 1a of the Appendix to this Petition ("Pet. App."). The February 26, 1997 Opinion of the California Court of Appeal, Second District, Division Three, affirming the Judgment entered by the Superior Court of the State of California, for the County of Los Angeles, is reported as an "Appeal-Statement" in *American Maritime Cases* at 1997 AMC 1520 (Pet. App. 2a), and is reproduced in full at Pet. App. 3a-18a. The Judgment entered by said Superior Court on June 7, 1995, and corrected by Stipulation on September 1, 1995, is not reported and is reproduced at Pet. App. 19a-22a. The Order and Decision of the Superior Court of the State of California, for the County of Los Angeles dated September 27, 1993, applying Bahamian law and liability limitations under the Athens Convention to the Kirmans' claims, is reported in *American Maritime Cases* at 1994 AMC 2848, and is reproduced at Pet. App. 23a-30a.[1]

JURISDICTION

The federal maritime law of the United States governs this litigation because it arises out of a cruise passage contract issued and purchased in the U.S. by American citizens for an ocean voyage, and the carrier has raised maritime choice of law issues.[2] The

[1]The Bahamas is a signatory to the "Athens Convention," which refers to the 1974 Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea and the 1976 and 1990 Protocols thereto. Article II, Para. (1) of the 1976 Protocol provides: "1. The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 46,666 units of account per carriage." "Units of Account" are defined as Special Drawing Rights ("S.D.R.'s") as set forth by the International Monetary Fund. At the time CFC sought to invoke such limitation herein, an S.D.R. was worth about $1.40, and when Judgment was entered, the carrier's liability under these terms of the Convention was limited in the aggregate sum of $72,688.00. The United States is not a signatory to the Athens Convention, which is reprinted in 6 M. Sturley, *Benedict on Admiralty* Doc. 2-2 (7th Ed. 1993).

[2]Such a passage contract constitutes a contract under American federal maritime law. *The Moses Taylor,* 71 U.S. (4 Wall.) 411, 427 (1867). A choice of law issue in a maritime case is a question of law, and the state courts below were bound to apply federal maritime law in this case. Such rulings on admiralty issues are reviewable by petition for a writ of certiorari. *Garrett v. Moore-McCormack Co., Inc.,* 317 U.S.

jurisdiction of this Court is invoked under 28 U.S.C. § 1257, to review the February 26, 1997 decision of the California Court of Appeal since it decides a maritime choice of law issue and the force and effect to be given to a maritime contract under federal maritime law, and since the California Supreme Court summarily denied the Kirmans' petition for review by Order dated May 21, 1997.[3] The decision of the California Court of Appeal is "final," because it affirms the Judgment entered by the Superior Court on June 7, 1995, which is based upon the choice of law ruling applying Bahamian law. While said Judgment is nominally in favor of the Kirmans, it is, in reality, adverse to them in all respects because it is in the maximum amount recoverable under Bahamian law and the Athens Convention. (Pet. App. 19a-22a.)

STATEMENT OF THE CASE

A. The Terms Of The Contract of Passage Controlling All Passenger Litigation Against CFC Arising Out Of The Cruise.

This case involves CFC's liability for injury losses to petitioners, American cruise passengers, while on a cruise aboard the ship *M/V OCEAN PEARL*. The vessel was owned by a Swiss company, and operated by respondent carrier CFC, a French corporation. CFC, the demise charterer of the vessel since early 1991, had responsibility for operation and maintenance of the vessel and supervision of its crew. The *OCEAN PEARL* flew the flag of the Bahamas.

The *OCEAN PEARL* was carrying the Kirmans on a cruise from Singapore through portions of Indonesia, the Java Sea and Australia. They purchased their contract of passage in Los Angeles, California where they reside. The cruise package included airfare from Los Angeles to Singapore, where they boarded the vessel on February 28, 1991, and airfare back to Los Angeles from Australia. About sixty (60) percent of the *OCEAN PEARL's* passengers were from the U.S.

239, 244-246 (1942); *Douchette v. Vincent, et al.*, 194 F.2d 834, 841-843 (1st Cir. 1952).

[3] *Second National Bank of Cincinnati, Ohio v. First National Bank of Okeana, Ohio*, 242 U.S. 600, 602 (1917).

The contract of passage, and the entire roundtrip cruise package from Los Angeles, was issued by CFC's sales and marketing representative in the U.S., Ocean Cruise Lines, Inc. in Ft. Lauderdale, Florida. The passage contract states that it applies to and governs this litigation:

> **"For valuable consideration, Compagnie Française de Croisieres, hereafter referred to as the 'Company,' agrees to provide the transportation specified herein for the passenger or passengers named herein, subject to all the terms of this Passage Contract, which are contained in this Passage Ticket.**
>
> * * *
>
> **"Art 2. PASSAGE CONTRACT CONSTITUTES ENTIRE AGREEMENT . . . , which *alone* fully and completely expresses the agreement between the passenger and the Company.**
>
> * * *
>
> **"Art. 21. PASSAGE CONTRACT APPLIES TO CLAIMS, SUITS OR LITIGATION OF ANY KIND. This Passenger Contract applies to claims, suits, and litigation of any kind, whether against the Company 'in personam' or the vessel 'in rem' or otherwise."** (emphasis added.)

CFC also intended for the passage contract to set forth and define its limitations of liability to passengers for personal injury and baggage loss:

> **"Art. 18 LIABILITY LIMITATIONS**
> (a) For Loss of Life or Injury the Liability of the Company for **loss of life of or injury to a passenger shall not exceed that provided by law.**
> (b) For Loss of or Damage to Baggage, Valuables, including Stateroom Baggage, etc.
> (1) It is agreed that the total value of the baggage, valuables, and personal belongings . . . of the passenger **shall not exceed the amount of $100 in U.S. currency for each passenger** unless . . .
> (i) the passenger declares in writing a higher value. . . ." (emphasis added)

Thus, Articles 18 and 21, specifically contemplate CFC's liability for "loss of life of or injury to a passenger" in any tort or contract litigation brought against it. Liability for injury loss is limited in this American cruise passage contract to that "provided by law," and baggage loss liability is limited to U.S. dollar amounts. In the only

other two places in the contract where the words "loss of life or injury" appear, U.S. law is the law to which the contract refers. These U.S. statutory law references appear in Articles 19 and 20, immediately following Article 18. Another reference to U.S. law appears in Article 23:

> **"Art. 19 NOTICE OF CLAIM**
> (a) The company is not liable for any claim for **loss of life or injury** unless written notice is given within six months . . . in respect to any claim where **Section 4283A of the Revised Statutes of the United States shall apply.**[4]
>
> * * *
>
> **Art. 20 TIME LIMIT ON SUITS** Suit to recover on any claim against the Company shall be instituted:
> (a) As to claims mentioned in subdivision (a) of Article 19 above within one year from the day when the **loss of life or injury** occurred, in accordance with **Section 4283A of the Revised Statutes of the United States.**
>
> * * *
>
> **"Art. 23 HIMALAYA CLAUSE** The passenger agrees . . . , except where **Section 4287 of the Revised Statutes of the United States shall apply."**[5] (emphasis added)

The passage contract contains no reference to the "law of the Bahamas," "Bahamian law," or an intention to litigate all claims under Bahamian law. The contract, and its "Liability Limitations" provision, contain no reference to the Athens Convention, or to any liability limitations thereunder. In fact, the terms to which CFC chose to bind its passengers by this contract do not otherwise comport with the Athens Convention.[6] The contract contains neither

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[4] Section 4283A appears at 46 U.S.C. § 183b. Section 183b makes it unlawful to provide for less than a six-month claim limitations period in a passenger ticket and applies to voyages which touch upon the U.S. CFC chose to communicate adherence to this particular U.S. statutory law provision in its contract even though the *OCEAN PEARL* did not call at any American ports.

[5] Section 4287 appears at 46 U.S.C. § 187 and involves reservation of remedies against "masters, officers or seamen" for various intentional and negligent acts.

[6] For example, Art. 16 of the Athens Convention provides for a two year limitations period, while CFC's passage contract sets forth a one year and six months time limit on suits in Art. 20(a) and (b) thereof. Art. 8 of the Convention limits liability for loss or damage to cabin luggage to "833 units of account per passenger, per carriage." Art. 18(b)(1) and (2) of the contract limit CFC's liability

an affirmative all-embracing separate choice of law provision nor a forum selection clause.

B. The Accident and Injury Losses.

At about 9:00 p.m. on March 4, 1991, the vessel *OCEAN PEARL* was at anchor off Bali. After dinner, Mrs. Kirman went up to the Promenade Deck, where she slipped and fell in water which spanned across the walkway of the Deck to the scuppers, and which was coming from an inconspicuous drain opening in the wall. She struck her head.

On the morning of March 10, 1991, Mrs. Kirman was found unconscious in her cabin. Upon her admission at Royal Darwin Hospital, she was found to have suffered a severe subdural hematoma which has caused severe and permanent injuries. The surgeon who removed the hematoma testified that it was the result of a blow, which had been incurred within a period of more than several hours and less than 7 to 10 days before March 10, 1991. This could be ascertained due to the state of clotting of the blood.

Mrs. Kirman is blind, totally paralyzed in her right upper and lower extremities, and incontinent. She is confined to a hospital bed, a wheelchair, or a special reclining chair which can accommodate her needs. She is able to speak in a mumble, which is incomprehensible to all but the few people who spend the greatest amount of time with her. Because of interference with her swallowing reflex, at times she is subject to choking on her specially prepared and cut-up food, and must constantly be watched even when she attempts to feed herself with special utensils. She has attendants who live with her on a 24-hour per day, seven day per week basis. There is no realistic likelihood of any substantial change in her condition.

C. Proceedings Below.

Petitioners filed suit against CFC and other entities in the Superior Court of the State of California, for the County of Los Angeles on July 23, 1991, seeking personal injury damages for Mrs. Kirman and loss of consortium damages for Mr. Kirman. CFC's Answer to the Complaint does not allege that Bahamian law applies, or assert that the Athens Convention or any limitations of liability or damages

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for baggage loss to "**$100 in U.S. currency** for each passenger," unless the passenger declares a higher value in writing and pays a specified "declared value charge."

thereunder apply to petitioners' claims. All named defendants other than CFC were subsequently dismissed.

CFC brought a Motion for Summary Judgment or Motion for Summary Adjudication of Issues raising choice of law issues and disputing liability, asserting: (1) Rules supplied under U.S. federal maritime law govern resolution of the choice of law issues; (2) The contract of passage and its terms are irrelevant because of the absence of a choice of law clause therein; (3) Under a maritime tort choice of law analysis via *Lauritzen v. Larsen*, 345 U.S. 571 (1953), Bahamian law applies because it is the law of the flag of the vessel;[7] and (4) The applicable and governing Bahamian law is as set forth in the Athens Convention, and CFC is entitled to limit its liability thereunder to an amount equivalent to about $75,000.00.[8] CFC, however, sought resolution of liability issues under U.S., not Bahamian, maritime law. It was **solely** to achieve the overall liability limitation for injury losses under the Athens Convention that CFC invoked application of the law of the flag via *Lauritzen*.

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[7] In *Lauritzen*, as discussed *infra*, the Court outlined seven factors to be considered in deciding whether the Jones Act (46 U.S.C. § 688) should be applied to a seaman's action against his maritime employer for personal injuries. The factors are: (1) the place of the wrongful act; (2) the law of the flag of the vessel; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. 345 U.S. 571, 583-591. The second factor, the law of the flag of the vessel, was given primary importance. However, the law of the flag is given little weight if it is merely a flag of convenience. *Id.*, at p. 587. In *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382 (1959), another general maritime and Jones Act employment case, the Court stated that, "The broad principles of choice of law and . . . criteria . . . set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." In *Hellenic Lines, Inc. v. Rhoditis*, 398 U.S. 306, 309 (1970), another seaman employment case, the Court added an eighth factor — the shipowner's "base of operations," whatever its formal allegiance might be. It was also held that the *Lauritzen* list of factors "was not intended to be exhaustive," and that the test was "not a mechanical one." *Id.* at pp. 308-309.

[8] See Footnote 1, *supra*. One legal analyst has noted that: "This Convention, although entered into force on April 28, 1987, has been criticized by many for the slight limits it places on the liability of maritime passenger carriers. In order to balance the inadequacy of those limits, a specific protocol modifying the Athens Convention was signed in London on March, 1990." [Fns. omitted.] The 1990 protocol "has not yet been enforced." (Footnote 96) Zunarelli, Professor Stefano, "Package Travel Contracts: Remarks on the European Community Legislation," 17 *Fordham Int'l. Law Journal* 489 (1994).

The Kirmans opposed the Motion on both liability and the asserted choice of law grounds, because: (1) CFC's "choice of law" argument was premised solely upon the desire to avail itself of a "Liability Limitation . . . for loss of life of or injury to a passenger," neither noticed nor communicated in the controlling contract of passage; (2) CFC could not urge application of federal maritime law principles to this case — albeit erroneously and exclusively under *Lauritzen* — and at the same time circumvent those very bodies of federal maritime law precedent that apply to the interpretation of, and force and effect to be given to, this passage contract issued and purchased in the U.S.; (3) The existence of the very contract of passage which CFC drafted, and those terms which expressly affirm its application to this litigation, cannot be ignored; and (4) The federal maritime law "reasonable communication" requirement cannot be circumvented at the whim of a carrier seeking application of foreign law solely to achieve previously non-communicated limitations of liability in a passage contract which specifically provides for "Liability Limitations," irrespective of the absence of a choice of law clause.[9]

On September 27, 1993, the Superior Court entered its Order and Decision, finding the subject passage contract to be irrelevant to its choice of law determination because of the absence of an affirmative choice of law clause. Via a mechanically applied *Lauritzen* approach, the court found that Bahamian law governs **all** aspects of this litigation since it is the law of the flag of the vessel, and the liability limitations of the Athens Convention apply. Pet. App. 23a-30a. Petitioners' efforts to seek interim appellate review of the Order and Decision were summarily denied.

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[9] As discussed in detail *infra*, federal maritime law precedent has long required that provisions conditioning and limiting the carrier's liability for passengers' losses be "reasonably communicated" by conspicuous placement in the contract of passage as a prerequisite of the carrier's ability to invoke such limitations. *The Majestic*, 166 U.S. 375, 386 (1897); *The Kungsholm*, 86 F.2d 703, 704 (2nd Cir. 1936). In *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 595 (1991), the Court recognized that one of the reasons why it is not unfair to enforce a "reasonably communicated" forum selection clause in a cruise passage contract, is that upon receiving notice of such a limiting term in the contract, the passenger "presumably retained the option of rejecting the contract with impunity." Nonexistent notice of limiting conditions cannot *a fortiori* afford either such option or fairness.

On March 23, 1994, following the submission of Bahamian authority on liability issues, the court found disputed triable issues of material fact, precluding summary adjudication of petitioners' negligence cause of action. CFC thereafter moved for entry of judgment, conceding negligence for the purposes of the motion, and requesting that judgment be entered in petitioners' favor in the maximum aggregate amount recoverable under the Athens Convention.

Petitioners opposed the entry of such a judgment, and the choice of law ruling upon which it is based, as adverse to them in all respects. It would amount to less than fifteen (15) percent of the more than $500,000 in medical expenses alone that had been incurred by Mrs. Kirman, since the accident. Future costs, without regard to inflation, were estimated at $1,500,000, if she suffers no further health problems. It is the already overburdened **American** health care benefits system that will continue to pay for the long-term care she requires due to CFC's negligence, if liability is limited under the terms of the Athens Convention. On June 7, 1995, the trial court nevertheless granted CFC's motion, and Judgment was subsequently entered in the amount of $72,688.00, plus petitioners' recoverable costs, in the amount of $14,230.55. Pet. App. 19a-22a.

Petitioners appealed from the Judgment and all rulings embodied therein. On February 26, 1997, the Court of Appeal filed its Opinion affirming the Judgment and the choice of law ruling upon which it is based. Pet. App. 2a; 3a-18a.

The Opinion below mischaracterizes cruise passenger litigation against a carrier as maritime litigation that does not necessarily arise out of a passage contract. (Pet. App. 8a-9a; 16a) There is no "maritime tort action" in the unique context of cruise passenger litigation against a carrier, for injury loss such as this, that does not arise out of the contract. Where a passage contract specifically addresses those "Liability Limitations" a carrier intends to assert — whether sued by the passenger "in personam" in tort or in contract — and itself states that it "applies to" all passenger litigation against the carrier, the contract does indeed mean what it says: The contract and that which it communicates and leads the passengers to reasonably expect in its "Liability Limitations" provision, together with its other provisions, govern the litigation and cannot be disregarded as irrelevant to a determination of choice of law. There **are** applicable contractual terms to consider and to enforce in a suit such as this for "loss of life of or injury to a passenger," and the issues

raised cannot be strictly characterized as solely "tort" issues. Federal maritime law principles, which concededly govern the interpretation of, and force and effect to be given to, such an American passage contract, are inextricably part of any determination as to whether the cruise carrier can invoke certain liability limitations against its passenger. This is so even when the carrier seeks to divorce itself from the contract it drafted and to achieve such liability limitations for passengers' losses via a traditional *Lauritzen/Rhoditis* route. See Fn. 7, *supra*.

Stripped of their passenger status, by judicial fiat deeming the American passage contract and its terms irrelevant to the carrier's ability to severely limit its liability to them, petitioners have been placed at the whim of a carrier who, faced with potential liability for an American passenger's catastrophic injuries and damages, has been allowed to assert application of the law of the flag of convenience that its vessel flies **solely** to achieve the drastic personal injury liability limitations of the Athens Convention. The carrier has been permitted to do so even though petitioners were given no notice whatsoever of the carrier's intention to so limit its liability.

The Kirmans' Petition for Review of the Opinion, filed in the California Supreme Court, was summarily denied on May 21, 1997. Pet. App. 1a.

REASONS FOR GRANTING THE PETITION

I.

THE COURT SHOULD RESOLVE THE CONFLICT WITHIN FEDERAL MARITIME LAW AS TO THE RELEVANCY OF AN AMERICAN CONTRACT OF PASSAGE AND ITS TERMS TO CHOICE OF LAW DETERMINATIONS INVOLVING UNCOMMUNICATED LIABILITY LIMITATIONS ASSERTED BY A CARRIER AGAINST ITS AMERICAN PASSENGERS IN LITIGATION ARISING OUT OF A CRUISE.

The decision below, together with one other known federal maritime law case,[10] stand in both theoretical and practical conflict with

[10]The unreported order and decision arise in subsequent proceedings in the case of *Anderson v. Cunard Line Limited*, 1995 U.S. Dist. LEXIS 4595, 1995 AMC

a venerable body of federal maritime law cruise litigation precedent, by allowing a cruise carrier to assert foreign liability limitations against an American passenger without finding that the carrier had "reasonably communicated" its intention to do so in its passage contract issued and purchased in the U.S. Consistent with long-standing federal maritime cruise litigation precedent, "reasonable communication" heretofore has been regularly and customarily accomplished by carriers carrying passengers on cruises which do not touch upon an American port, with an affirmative choice of law provision, or specific stated personal injury liability limits or amounts, or a forum selection clause specifying a foreign forum in the passage contract.

A controlling American passage contract and its terms, purporting to define the rights of passengers, conditions of the passage, the obligations and any and all "Liability Limitations" of the carrier to

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1499 (E.D. La. 1995), *cert. denied*, 116 S.Ct. 180, 133 L.Ed. 2d 119 (1995). The maritime rulings for which review was sought in this Court involved the determination that Anderson, a professor who gave topical lectures to other cruise passengers in exchange for free passage, could not state a cause of action under the Jones Act and the court's transfer of the matter to the United States District Court for the Southern District of New York, pursuant to a forum selection clause. Following the transfer of the case to New York, the carrier Cunard moved the court for partial judgment, contending that Bahamian law should be applied to the litigation, then bearing the case number 95 Civ. 2985 (KMW) (HBP) (S.D.N.Y. 1996). In an unreported Report and Recommendation, United States Magistrate Judge Henry Pitman granted Cunard's motion, finding the passage contract and its terms, which did not contain an express choice of law provision, to be immaterial to the determination that Bahamian law applied via a *Lauritzen* choice of law analysis: "[T]he choice-of-law analysis here is the same analysis that would be performed if there had been no written contract between plaintiff and defendant." (Report, at p. 14.) In its motion, Cunard had invited the Magistrate's attention to the Order and Decision of the Superior Court, affirmed by the Court of Appeal below, as one which supported its position that the Athens Convention's limitations can be invoked against its passengers under a choice of law analysis which disregards the contract of passage and its terms. The Magistrate's report acknowledges the decision below, without relying upon it, as "reach[ing] the same conclusion . . . reach[ed] here." [Report, at p. 17, Fn 9.] The unreported Order of United States District Judge Kimba M. Wood, 95 Civ. 2985 (KMW) (S.D.N.Y. 1997), adopts the Magistrate's Report and Recommendations. Petitioners believe *Anderson* to be the first of many federal maritime cruise passenger litigation cases that will appear wherein the carrier will seize upon the reported Order and Decision affirmed in the Opinion below, and the conflict now existing within federal maritime law precedent, as authority sanctioning the assertion of non-communicated liability limitations against its passengers via a *Lauritzen* route.

its passengers, have been disregarded. A foreign flagged vessel carrier has been allowed to escape the contract's significance entirely and invoke severe liability limitations for losses, other than and in addition to those of which notice was given in the controlling contract. A maritime tort choice of law approach has been utilized and mechanically applied so as to obliterate the distinction between paying passengers, heretofore entitled to rely upon that which the carrier has seen fit to include in its passage contract, and mere visitors aboard the vessel, whose substantive and procedural legal rights vis-à-vis the carrier are undefined and unaffected by any contract of passage.

With the conflict in federal maritime law that has now been created, there is no longer any reason for a foreign carrier or a foreign flagged vessel carrier, competing in the U.S. with American-based cruise lines for a share in the ever-growing and immensely profitable cruise line industry,[11] to even attempt to comply with the "reasonable communication" requirement. Such carriers can now achieve by deliberate silence that which previously could be achieved only by fair notice to the passenger. It is a tragedy that a century of precedent upholding the requirement has been rendered meaningless. See Footnote 9, *supra*. The prior and better reasoned law struck a fair balance between the legitimate needs of carriers for predictability and convenience in litigation matters, and the legitimate needs of passengers to fair notice of any liability limitations and limiting conditions that may not reasonably be expected and that may seriously affect rights they believe are possessed.

The effects of the conflict created will be far-reaching, and there will be a significant economic impact extending beyond the cruise line industry. The strained American health care benefits system and American insurers will feel the impact from allowing cruise carriers to so drastically and unexpectedly limit their liability for serious injuries suffered by their American passengers.

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[11] As recognized in *Vavoules v. Kloster Cruise Ltd.*, 822 F.Supp. 979, 980 (E.D. N.Y. 1993): "The cruise industry is booming. *** More than 4.2 million people took cruises in 1992 and it is expected that the number will reach five million this year. *** This 'fastest growing segment of the leisure travel industry' has been called 'recession-resistant. [Citations.]' "

A. Federal Maritime Law Has Long Recognized That The Contract Of Passage Defines The Passenger-Carrier Relationship And The Rights And Obligations Between The Carrier And The Passenger.

The conflict in principle that now exists within federal maritime law cruise passenger litigation precedent is indeed a deep one. The premise upon which the "reasonable communication" requirement was articulated and developed — that it is the contract of passage that defines the rights between the carrier and the passenger — has been turned upside down with the notion that it is no longer that which **is** "reasonably communicated" by a carrier that defines and controls the terms of the passage, but rather than which is **not** communicated at all that serves to define the terms of the carrier-passenger relationship. With precedent that now advocates disregard for the significance of the contract of passage and its terms altogether, carriers can now dispense with the "reasonable communication" requirement, solely by declining to include an affirmative choice of law clause in those passenger contracts issued and purchased in the U.S. for foreign cruises. See Fn. 10., *supra*.

An American passage contract has traditionally been considered as all important in a passenger's case against a carrier, whether that case sounds in tort or in contract. It has long been recognized as "more than a mere token or voucher. It is a contract, creating the obligation and defining the terms of carriage. . . . [Citations.]" *Reichman v. Compagnie Generale Transatlantique*, 290 N.Y. 344, 351 (1943).

> ". . . A passenger is one who travels in a public conveyance by virtue of a contract with the carrier, express or implied, paying fare or something accepted as an equivalent therefor. [fn. omitted.]. . . . ¶**The basis for the passenger-carrier relationship is the contract of carriage** . . . entered into between the traveler and the shipowner [or carrier], or by their respective agents. (fns. omitted). . . . ¶**A distinction must be made between an invitee, licensee or trespasser on the one hand and a passenger, on the other. Again, it is the contract of carriage, which provides the basis of distinction.**" (emphasis added) Norris, *The Law of Maritime Personal Injuries* (4th ed. 1990) § 3.1, at pp. 58-60.

See also *Rutledge v. A&P Boat Rentals, Inc.*, 633 F.Supp. 654, 656, 658 (D.C. La. 1986); *Murray v. Cunard Steamship*, 235 N.Y. 162, 165 (1923).

CFC's assertion of entitlement to liability limitations under the Athens Convention cannot properly be justified as arising solely by virtue of law applied via maritime tort choice of law principles, in a misperceived vacuum created by the omission of an affirmative choice of law provision in the contract of passage. While the contract does not contain an express choice of law term, it **does** contain "Liability Limitations" terms which apply to this claim for injury loss and all other claims against the carrier. This case is really all about the assertion of liability limitations, not about choice of law. It was only to secure limitations that CFC invoked maritime tort choice of law principles under *Lauritzen* in the first place. The passage contract and its "Liability Limitations" terms do not lose significance simply because a passenger's action against a carrier sounds in tort, rather than in contract:

> "... **[T]he passenger-carrier relationship is predicated upon the contract of carriage, ... The passenger injured** through the fault of the carrier **has a cause of action based on the breach of the contractual obligation** ... to transport him safely **[and] ... the alternate cause of action, of damages for personal injuries under tort principles.**" (emphasis added) Norris, *supra*, § 3.5, at p. 64.

The Opinion below concludes that the passage contract and its terms need not be considered at all because, "[t]his is not an action on a contract" and because, "where choice of law does not depend on a contractual [choice of law] provision, no consideration is given to the question of [whether] notice [has been given to the passenger of important terms by 'reasonable communication' in the passage contract itself]." (Pet. App. 8a-10a). These conclusions ignore that which is implicitly at the core of **all** litigated passenger claims against a carrier when the passage contract is concededly subject to interpretation under federal maritime law principles because it was issued and purchased in the U.S.: (1) A contract addressing the substantive and procedural rights and liabilities of the parties in all litigation arising out of the cruise, applies whether the passenger elects to sue in tort and/or in contract; (2) The "reasonable communication" requirement imposed by federal maritime law applies whether the passenger pursues claims against the carrier sounding in tort **or** in contract; (3) The "reasonable communication" requirement applies **as forcefully** in cases involving **non**-communication of limiting terms and conditions, as it does in cases

involving inadequate communication of such terms; and (4) Application of the "reasonable communication" standard to a foreign carrier has **never** before been conditioned upon the presence of an affirmative choice of law clause in the contract.

Federal maritime precedent in this context is replete with "maritime tort cases" which nevertheless revolve around interpretation of the passage contract, and that which is **or** is not "reasonably communicated" to the passenger.[12] A determination of a passenger's rights and a carrier's ability to invoke limitations affecting those rights cannot be divorced from consideration of that which the American passage contract did or did not "reasonably communicate" to the passenger in these regards. In this case, CFC chose to address "Liability Limitations" for losses for personal injury in its passage contract, and the question is whether CFC gave notice of and "reasonably communicated" its intention to limit its liability for "loss of life of or injury to" its passengers under the terms of the Athens Convention **or** under Bahamian law.

Courts have long focused on whether the contract gives passengers notice of the existence and importance of substantive and procedural limiting conditions that the cruise carrier intends to impose. A century ago, it was declared in *The Majestic, supra*, 166 U.S. 375, 386:

"When a company desires to impose special and more stringent terms upon its customers, in exoneration of its own liability, there

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[12] See e.g. *Axelrod v. Incres Line Agency, Inc.*, 243 F.Supp. 149 (S.D.N.Y. 1964); *Caruso v. Italian Line*, 184 F.Supp. 862 (S.D.N.Y. 1960); *DeNicola v. Cunard Line, Ltd.*, 1981 A.M.C. 1388 (1st Cir. 1981); *Effron v. Sun Cruise Lines, Inc.*, 67 F.3d 7 (2nd Cir. 1995); *Erik v. Norwegian Caribbean Lines A/S*, 15 Fla. Law W. 756 (1990); *Fricke v. Isbrandtsen*, 151 F.Supp. 465 (S.D.N.Y. 1957); *Furr v. Societa Italiana Transporti Marittimi*, 162 F.Supp. 645 (S.D.N.Y. 1958); *Gardner v. Greek Line*, 388 F.Supp. 856 (M.D. Pa. 1975); *Hicks v. Carnival Cruise Lines, Inc.*, 1995 A.M.C. 281 (E.D. Pa. 1994); *Hirsch v. Klosters Rederi A/S*, 521 So.2d 316 (Fla. Dist. Ct. App.3d Dist. 1988); *Jansson v. Swedish American Line*, 185 F.2d 212 (1st Cir. 1950); *Lerner v. Karageorgis Lines, Inc.*, 66 N.Y.2d 479 (1985); *Maibrunn v. Hamburg-American S.S. Co.*, 77 F.2d 304 (2nd Cir. 1935); *McCaffrey v. Cunard S.S. Co.*, 139 F.Supp. 472 (S.D.N.Y. 1955); *Melnik v. Cunard Line Ltd.*, 875 F.Supp. 103 (N.D.N.Y. 1994); *Milanovich v. Costa Crociere S.P.A.*, 954 F.2d 763 (D.C. Cir. 1972); *Miller v. Lykes Bros. S.S. Co.*, 467 F.2d 464 (5th Cir. 1972); *Mills v. Renaissance Cruises*, 1993 A.M.C. 131 (N.D. Cal. 1992); *Raskin v. Compagnia de Vapores Realma S.P.*, 521 F.Supp. 337 (S.D.N.Y. 1981); *Silvestri v. Italia Societa Per Azoni di Navigazione*, 388 F.2d 11 (2nd Cir. 1968); and *Toohill v. Cunard Steamship*, 130 F.Supp. 128 (D.C. Mass. 1955).

is nothing unreasonable in requiring that those terms shall be distinctly declared and deliberately accepted."

While "deliberate acceptance" is no longer required, limiting conditions "must be incorporated, at least by reference, into the very body of the contract." *Bellocchio v. Italia Flotte Riunite Cosulich Line*, 84 F.2d 975, 976 (2nd Cir. 1936); *The Kungsholm, supra*, 86 F.2d 703, 704. Petitioners are unaware of any authority limiting the "reasonable communication" requirement to only American-based carriers. The notice requirement applies as forcefully to liability limitations, as it does to time limitations. *Cada v. Costa Line*, 1984 A.M.C. 1491, 1495, fn. 3 (N.D. Ill. 1982).[13] It applies to all passage contracts subject to interpretation under federal maritime law, which are those contracts issued and purchased in the U.S. by American citizens, for a wholly foreign cruise **or** for a cruise that touches an American port. See, e.g., *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11, 13 (5th Cir. 1979); *Everett v. Carnival Cruise Lines*, 677 F. Supp. 269 (M.D. Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F. Supp. 563 (S.D.N.Y. 1987); *Barbachym v. Costa Line, Inc.*, 713 F.2d 216 (6th Cir. 1983); and *Mills v. Renaissance Cruises, supra*, 1993 A.M.C. 131.

As stated by the court in *Toohill v. Cunard S.S. Co., supra*, 130 F.Supp. 128, 129-130 (D.C. Mass. 1955):

> **"The tort charged in the complaint arose out of performance of a contract made in the United States.** *** ¶The Majestic is the 'landmark' case . . . and stands for the proposition that **an exception which is not part of the contract of passage and is not referred to in the body of the contract . . . may not protect the carrier against liability,** depending upon certain further circumstances. *** ¶*If* **the limitation provisions had been part of the contract of passage the passenger would have been bound by them . . . provided they were not unlawful in content.** [Citations.] **Stipulations affecting the carrier's liability** which are not part of the contract, however, must in order to be effective, **be brought to the knowledge of the passenger.**" (emphasis added.)

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[13] In fact, pursuant to 46 U.S.C. § 183c, a passenger contract for a cruise that touches a U.S. port cannot contain a provision limiting the carrier's monetary liability. Other limiting conditions may be invoked, and are enforceable, provided the "reasonable communication" requirement has been met.

B. The Opinion Below Is Squarely In Conflict With Federal Maritime Law Precedent Holding That The Liability Limitations Of The Athens Convention Cannot Be Invoked By The Carrier Absent "Reasonable Communication" And Notice Thereof in the Contract of Passage.

Federal maritime law authority that the court below dismissed as inapposite "contract" precedent, holds that absent "reasonable communication," the Convention's limitations cannot be invoked. In *Mills v. Renaissance Cruises, supra,* 1993 A.M.C. 131, 132, 136, the court stated:

> **"A limitation of liability provision is incorporated into a passenger ticket contract where the carrier 'reasonably communicated to its passengers that the contractual term affects their legal rights.'** [Citations.] The question of whether such provision was reasonably communicated to the passenger is a question of law for the court [Citation.], and depends upon an analysis of the overall circumstances of the case. [Citation.] The relevant factors for the court to consider are: (1) the physical characteristics of the ticket contract, *i.e.* the language and placement of the limiting provisions; . . .
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> * * *
>
> **"Since neither *the Athens Convention* nor the *1976 Protocol* have been ratified by the United States, they *carry no force of law.* Rather, *the definitions in the limitation of liability provision have force solely by virtue of their incorporation into the contract."* (emphasis added.)**

In *Mills,* just as in this case, it is implicit that federal maritime law governs the interpretation and force of the contract. *Mills* also involves a passage contract purchased in the U.S. for an entirely foreign cruise. In *Mills,* the foreign carrier was entitled to invoke the Convention's limits precisely because the "reasonable communication" standard was met. In stark contrast to the contract herein, that in *Mills* specifically referred to application of the Articles of the Convention, stating: "the Carrier's liability shall not exceed . . . as defined in the amendment of 1978 to the Athens Convention, article 9: [to be] S.D.R. 46,666." *Id.* p. 132. After analyzing the "placement of the provision, with the use of bold face, . . .," the court found the provision "sufficiently noticeable" so as to **"put**

plaintiffs on notice of the liability limitation." (emphasis added.) *Id.*, at p. 133.

The case of *Berman v. Royal Cruise Lines, Ltd.*, 1995 A.M.C. 1926, 1928 (L.A.S.C., West Dist. 1995) is also on point. *Berman* involves a Bahamian flag vessel, the *M/V CROWN ODYSSEY*, operated by RCL. The passage contract was purchased in the U.S. for an entirely foreign cruise. The terms of the RCL contract provided:

> "STATUTORY LIMITATIONS ON LIABILITY: In addition to all of the. . .limitations of liability provided by this Contract, Carrier. . . shall have the benefit of any statutory limitation of liability. . .available in the applicable forum, including but not limited to 46 U.S. Code ¶¶ 181 through 186, . . . **and the Athens Convention Relating to the Carriage of Passengers and Their Luggage By Sea 1974 (the Athens Convention)**." (emphasis added.).

The court rejected the passenger's argument that a, "carrier is required to notify each passenger of the precise number of Special Drawing Rights (SDR's)," . . . "**because plaintiff was given sufficient notice in the ticket** of the applicability of the Athens Convention to his cruise, **the limits** set forth in the Athens Convention **are binding** upon plaintiff." (emphasis added.) *Ibid.*

Mills and *Berman*, consistent with federal maritime cruise litigation principles, establish that **unless** a carrier reasonably communicates its intention to rely upon a foreign law which adopts the Athens Convention, the Convention itself, or liability limitations thereunder in the passage contract, such limitations are **not** enforceable against the passenger under U.S. federal maritime law:

> "1. RCL's ticket contract reasonably communicated to plaintiff that his legal rights were affected by ¶ 16 of the passenger ticket. *Holland v. Norwegian Cruise Lines*, 1991 AMC 877, 878, 765 F.Supp. 1000, 1002 (N.D. Cal. 1990); *Mills v. Renaissance Cruises*, 1993 AMC 131, 136 (N.D. Cal. 1993). [It] is not ambiguous, and is only susceptible to one reasonable interpretation: that RCL claims the benefit of the limitations of liability set forth in the Athens Convention.
>
> "2. Although the United States is not a signatory nation, the damage limitations of the Athens Convention are enforceable in

this case as a contractual term in the passage contract. *See, e.g., Mills, supra; Becantinos v. Cunard Lines*, 1991 WL 654187 (S.D.N.Y. 1991)." *Id.* at p. 1929.

Mills and *Berman* are in keeping with two other cruise litigation cases wherein the issue of application of the Convention's limitations was raised. In *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, at 915 fn. 5, (3rd Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989), the court noted that the carrier's intention to invoke the Athens Convention's limitations **was** incorporated in the passage contract containing an Italian choice of law clause, and that it would remain for the Italian courts to rule on enforcement of the contractual terms, together with all other issues. In *Becantinos v. Cunard Lines, Ltd.*, No. 89 Civ. 166 (JSM) 1991 WL 654187 (S.D.N.Y. 1991), the court found the baggage damages limitations of the Convention "binding" on plaintiffs, because "the terms of the Athens Convention [were] incorporated by reference into the Passage contract ticket issued." The Opinion below allows CFC to reach, by deceptive **silence**, the same result that these other carriers have reached by "reasonable communication."

The "Liability Limitations" provision in the passage contract issued by CFC, read as a whole, is most fairly construed as meaning that CFC is **not** intending to invoke a specific restricting limitation as to damages for "loss of life of or injury to a passenger." It is custom and practice within the cruise ship industry for a foreign carrier to "reasonably communicate" its intention to rely upon a foreign law or liability limits **other** than those arising under U.S. law in an American passage contract in one or more of three ways: (1) A choice of law clause; (2) Stated liability limits or amounts for a type of loss; or (3) Specifying a foreign forum. Provided such notice has been given, courts generally enforce such provisions in tort and contract cases brought against the carrier. Proper notice, however, is a **prerequisite** to the carrier's ability to secure such liability limitations, just as it is with other limiting conditions. As stated in *Effron v. Sun Cruise Lines, Inc., supra*, 67 F.3d 7, 9: "The legal effect of a forum selection clause **depends in the first instance** upon whether its existence was reasonably communicated to the plaintiff. [Citations.]" (emphasis added.) See also Fn. 9, supra. "If Cunard never communicated (actually or constructively) the back of the reservation form [containing a forum selection clause] to Kalman, then it would be unreasonable to enforce the forum

selection clause against her." *Kalman v. Cunard Lines, Ltd.*, 1995 A.M.C. 2137, 2141 (D.C. Hawaii 1995).

Just as in *Silvestri v. Italian Societa Per Azioni Di Navigazione, supra*, 388 F.2d 11, 17 and *Raskin v. Compania de Vapores Realma S.P., supra*, 521 F.Supp. 337, "[n]othing whatever was done to impress the importance of the terms and conditions [CFC seeks to invoke] on the passenger." "The 'reasonableness' of notice to the passengers of critical terms of carriage contracts is a question of law," and "nonexistent" notice — such as that involved herein — clearly does not meet the "reasonableness standard." *Barbachym v. Costa Line, Inc., supra*, 713 F.2d 216. See also *Shankles v. Costa Armatori, S.P.A.*, 722 F.2d 861 (1st Cir. 1983). In *O'Connell v. Norwegian Caribbean Lines, Inc.*, 639 F.Supp. 846, 852 (N.D. Ill. 1986), the court observed:

> "* * * [The carrier] is attempting to limit the rights of the plaintiff, and it must do so in a manner reasonably calculated to inform the plaintiff of those limitations and their importance. It cannot control what plaintiff does, but it can control what it does."

II.

THE QUESTIONS RAISED ARE OF NATIONAL AND INTERNATIONAL IMPORTANCE, AND THIS IS AN APPROPRIATE CASE FOR THEIR RESOLUTION.

There is national and international significance to the determination of whether a foreign flagged vessel carrier who deliberately chooses to address "Liability Limitations" in its passage contract issued to, and purchased in the U.S. by, American citizens, and whose contract is geared to its **many** American passengers, can circumvent the longstanding and sensible "reasonable communication" requirement simply by omitting an affirmative choice of law clause. Fundamental principles of federal maritime law and policy have been jeopardized by an artificial distinction between tort claims and contract claims in the unique maritime context of cruise passenger litigation, where **all** passengers' claims against the carrier arising out of the cruise necessarily arise out of such a controlling passage contract.

It is in the national interest to decide whether it is in conformity with federal maritime law principles and sound policy to allow a

foreign flagged cruise vessel carrier to invoke foreign liability limitations, available by virtue of the law of the flag of convenience it flies,[14] via a maritime tort choice of law analysis asserted for the first time against its American passengers years into the litigation. Is such reliance upon U.S. maritime tort choice of law principles sanctioned when designed **solely** to achieve drastic liability limitations, different from and in addition to those set forth in the passage contract's "Liability Limitations" provision? Should the foreign carrier be allowed to select to be bound by only those principles of federal maritime law that serve its **own** purposes, and assert such principles against American citizens who comprised about **sixty (60) percent** of the vessel's passengers?

This Court should decide whether it is in the best interests of **both** the immensely successful cruise line industry and the ever-growing number of American citizens who are embarking upon cruises, to obliterate the historical and practical significance of the cruise passage contract and the relationship with the carrier created and defined therein and thereby. The Opinion below determines the carrier's potential liability for losses to paying passengers, who have a contractual relationship with the carrier that encompasses such losses, as if they were non-paying visitors, who board the vessel, for example, to attend a reception or to visit some passenger friends during the course of a stop at a port of call. If Mrs. Kirman had been such a visitor, who boarded the vessel for an evening to dine with friends, and suffered the same injuries, a traditional maritime tort choice of law analysis under *Lauritzen* could **alone** serve to resolve the question of which nation's laws should apply to govern CFC's liability, and any limitations for losses thereunder it could invoke against the Kirmans.

However, shouldn't American paying passengers continue to have the protection of the laws of the country where the passage contract was issued and purchased, and security in relying upon what is "reasonably communicated" to them in the contract? Should the reasonable expectations of American passengers arising out of the

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[14] "A flag of convenience is a flag flown by a vessel registered in one state, and with which the vessel has few or no connections, while in reality the vessel is owned or operated from another state." [Fn. omitted.] Tetly, William Q.C., "The Law of the Flag, 'Flag Shopping' and Choice of Law," 17 *Mar. Law.* 139, 173 (Spring, 1992).

terms of a binding U.S. maritime contract be disregarded, via a choice of law approach urged by a foreign flagged vessel carrier, that serves only to further the carrier's self-interests? Should U.S. law indulge the foreign carrier's undisclosed self-interests at the expense of a sensible standard of reasonable notice that has heretofore served to protect the rights and expectations of carriers **and** their passengers?

There has been an abandonment and dismissal of a century of applicable well-reasoned cruise litigation precedent as inapposite maritime "contract law" authority, in what has been misperceived as strictly a "tort" case, in which the passenger-carrier contractual relationship has absolutely no significance. This Court should consider the propriety of allowing a foreign flagged vessel carrier to drastically limit its liability for personal injury to its American citizen passengers, no matter what terms the carrier chose to include in its passage contract in addressing "Liability Limitations," and no matter how U.S. law and currency limitations are referenced and appear elsewhere in a contract.

III.

THERE WAS ERROR COMMITTED IN THE COURT BELOW.

A. Bahamian Law Does *Not* Govern The Interpretation Of, And Force And Effect To Be Given To, The Contract Of Passage.

The Opinion below affirms the Superior Court's Judgment and choice of law ruling, that Bahamian law applies to and governs **all** aspects of this litigation, Pet. App. 6a; 29a-30a. In *Jansson v. Swedish American Line, supra*, 185 F.2d 212, 216, the court observed: "When a common law action is brought, . . . to enforce a cause of action cognizable in admiralty, the substantive law to be applied is . . . the general maritime law as developed and declared, in the last analysis, by the Supreme Court in the U.S. ***." Issues involving the interpretation of the passage contract are also governed by federal maritime substantive law. As set forth in *Hodes, supra*, 858 F.2d 905, 908-909:

> "A passenger ticket for an ocean voyage is a maritime contract. [Citation.] Accordingly, whether ticket conditions form part of the passenger's contract and the effect such conditions should be

> afforded are matters governed by the general maritime, not the local state, law. *** [fn. 2] ***[fn 2] Applying the general maritime choice of law rules to this litigation, we find American general maritime substantive law controls the issues before us today. ***[T]he preliminary question of whether a specific condition is incorporated into a ticket contract putatively entered into in the United States by an American citizen is one for American law to decide.** [Citations.]" (emphasis added.)

CFC did not assert that law other than federal maritime law applies to interpret its passage contract. CFC's position, adopted in the Opinion below, is simply that the contract, including its "Liability Limitations" provision, are **irrelevant** Pet. App. 12a. CFC's position is that there is nothing to interpret because of the absence of an affirmative choice of law clause, irrespective of the presence in the contract of "Liability Limitations" terms. CFC did not assert that choice of law should be determined under Bahamian law. CFC urged application of federal maritime law, albeit improperly and exclusively, under *Lauritzen*.

The court below failed to recognize that the only way for CFC to extricate itself from the terms of the passage contract that it drafted, and the reasonable expectations arising therefrom, is by asserting exemption from the "reasonable communication" requirement. The only way to achieve this is by asserting that a law **other** than U.S. federal maritime law governs the interpretation of, and force and effect to be given to, the contract. CFC did not present any Bahamian law, or any other foreign law for that matter, on the issue of what law governs interpretation of the contract. There has been no showing whatsoever that federal maritime law does not so govern.

> "It is the general rule that the nature, obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view and clearly manifest a mutual intention that the contract shall be governed by the law of some other country. [Citation.]" Norris, *supra*, § 3.22 at p. 95.

When considering a passage contract containing some reference to application of a nation's laws, as does the subject contract, or a contract affirmatively stating that a foreign law applies for all purposes, or where a party claims that a foreign law applies, courts applying federal maritime law in the cruise litigation context have

utilized two tests to determine whether such foreign law applies to interpret and govern the contract — the "intention of the parties" test and the "grouping of contacts" or "center of gravity" test. These tests or approaches are not supplanted by a *Lauritzen* analysis, and involve consideration of different factors. Neither test supports the application of Bahamian law — or any law other than U.S. law — to interpret and govern the effect of the subject contract.

The expectations of the parties are extremely significant in determining which nation's substantive law should be applied to litigation arising out of a passage contract. As stated in *Fricke v. Isbrandtsen, supra,* 151 F.Supp 465, 467-468:

> "Ordinarily, the federal courts determine which law governs a contract by 'grouping the contacts' or 'finding the center of gravity' of the contract. The law of the jurisdiction having the closest relation with the contract is selected because, it is felt, the parties contracted probably with that law (if any law) in mind, and that jurisdiction would probably have the greatest interest in defining the rights of the contracting parties.*** Where the parties themselves have stipulated to governing law, it would seem that their expectations would best be given effect by applying their choice. However, judicial inquiry is not confined to the contractual clause; the private selection is but one element, although a weighty one, determining the judicial finding of the appropriate law.***"

In *Fricke,* where a German passenger was seeking application of German law, the court observed that, "all of the incidents surrounding the sale of the ticket took place in Germany. Plaintiff, if she considered any law, probably felt that German law controlled." *Ibid.* Herein, "all of the incidents surrounding the sale" took place in the U.S and the contract's provisions specifically contemplate application of only the laws of the U.S. Baggage liability limits are set forth in U.S. dollar amounts; and petitioners had no expectation that any other nation's laws would be invoked as controlling their passenger-carrier relationship with CFC. The *Fricke* court also recognized the significance of considering whether the law that the passenger seeks to apply "affords protection to parties in this plaintiff's position," and any "strong national policy" that would affect the choice of law decision. Federal maritime law and policy in this country have been developed precisely to protect passengers against the assertion of **non**-communicated liability and loss limitations by the carrier,

which drastically affect the passengers' rights and reasonable expectations:

> "... [U]nless a party, in [these] circumstances ... can be said to have understood that another law from the one normally governing the contract is to control, it would be improper to decide a question which poses a choice between legal systems having quite different jurisprudential philosophies on American contract law principles." *Id.*, at p. 468.

See also *Caruso v. Italian Line, supra,* 184 F.Supp. 862, 863: "The relevant contacts are the place of making the contract (probably the most important), the place where the voyage was to begin and the place where the accident causing the injury occurred." None of these "contacts" point to Bahamian law in this case.

In *DeNicola v. Cunard Line, supra,* 642 F.2d 5, 7, fn. 2, notwithstanding the presence of an English choice of law provision, U.S. maritime law governed the interpretation and force and effect to be given to the contract:

> "**... Since the plaintiff here is an American citizen seeking redress for an injury which occurred on the high seas during a voyage for which she contracted in the United States and which terminated in an American port, there were sufficient contacts with this country to warrant application of its law.**" (emphasis added.)

While the instant cruise did not "terminate in an American port," petitioners' cruise package included airfare to and from America. In *McQuillan v. "Italia" Societa Per Azione Di Navigazione,* 386 F.Supp. 462, 466 (S.D. N.Y. 1974), the passage contract's reference to U.S. statutes, manifesting the parties' intentions to be bound thereby, combined with other factors, including the plaintiff's American citizenship, led to application of U.S. law, despite an Italian choice of law clause.

Application of the "center of gravity" test similarly does not support application of Bahamian law as there is no evidence of "centering" around the Bahamas. See *Mulvihill v. Furness, Withy & Co.,* 136 F.Supp. 201, 206 (D.C.N.Y. 1955) and *Milanovich v. Costa Crociere S.P.A., supra,* 954 F.2d. 763. The only connection that this litigation has with the Bahamas is the flag flown by the vessel. The court below failed to appreciate the distinctions between

this case and *Jansson, supra,* 185 F.2d 212 (1st Cir. 1950), wherein foreign law was applied. Pet. App. 9a–11a. In *Jansson,* the court found "centering" around Sweden, given a Swedish carrier seeking application of U.S. law; a Swedish passenger urging application of Swedish law to a Swedish passage contract issued and purchased in Sweden; and an accident in Swedish territorial waters.

Herein, the American passengers are calling for application of the same law that would normally govern this passage contract, issued and purchased in the U.S.; the law of the same nation whose statutes and currency are repeatedly referenced in the contract; and the same law that concededly governs the interpretation of the contract and the choice of law issue raised by the carrier. CFC itself rejected any notion of "centering" around the Bahamas in seeking application of U.S. law to resolve choice of law and negligence liability issues. Pet. App. 25a. If Bahamian substantive law genuinely applies to all aspects of this litigation, the interpretation of, and the force and effect to be given to, the passage contract and its terms should have been determined under that foreign law. Pet. App. 29a-30a. No such determination was sought by CFC or made by the courts below, and it is clear that the contract is subject to interpretation under federal maritime law.

The nation's "law" to which CFC refers in Art. 18, subdiv. (a) of its contract is not expressly communicated. There is absolutely no indication, however, that CFC was intending reference to Bahamian law or to the Athens Convention. The passage contract is a sophisticated document, clearly not drafted by amateurs. It contemplates application of U.S. law, referring only to U.S. statutory law and currency (Arts. 18, 19, 20 and 23).[15] If indeed, CFC always intended to invoke limitations of liability for losses due to passenger injury under the Athens Convention by seeking application of the

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[15]The Opinion below diminishes the significance of these references to U.S. statutory law, finding that they "only provide passengers procedural rights, not substantive choice-of-law rights" (Pet. App. 9a-11a.). Such an approach misses the point: These references to application of U.S. law, whether procedural in nature or not, lead the passenger to reasonably expect that no law other than that which would normally be expected to apply to govern this **American** contractual relationship, namely U.S. law, is being invoked by the carrier. The repeated references to U.S. law bolster the expectation that procedural and substantive liability limitations for passengers' losses, other than those stated, that may exist under some unknown foreign law or foreign convention, are not being asserted by the carrier in connection with this particular cruise passage.

law of the Bahamas, the failure to so provide in the contract appears to be a deliberate act of deception. The omission of a stated personal injury loss liability limitation, or a limitation other than would apply under U.S. law by virtue of this controlling contract, simply had to be a knowing and deliberate one on the part of CFC in drafting the contractual terms which were to control the carriage.

The "Liability Limitations" provision in the contract, read as a whole, is most fairly construed as meaning that there is no specific restricting limitation similarly being invoked by CFC as to damages and losses for death of "or injury to a passenger." Any ambiguity should be construed **against** CFC, the drafter of the subject contract. *See Bedell v. P.O. Steam Nav. Co.*, 1985 A.M.C. 2013, 2019 (N.D. Texas 1985); *Encyclopedia Britannica v. Hong Kong Producer*, 422 F.2d 7, 15 (2nd Dist. 1969).

Pursuant to the very language of the contract drafted by CFC, its terms, including the "Liability Limitations" of Art. 18, "**alone** fully and completely [express] the agreement between the passenger and [CFC]." (emphasis added) (Arts. 2; 21.) The terms, which CFC chose to place in its contract, do not manifest at all an intention to invoke a foreign law or to restrictively limit liability for damages for personal injury loss. Where CFC did intend to invoke a restrictive limitation, it was so stated. (Art. 18(b)(1) and (2).) CFC has been permitted to nullify its contract, at its whim, and to impose additional loss limitations and conditions, that conflict with the passengers' reasonable expectations, and which contravene that which constituted the "entire agreement" between the parties. To accept CFC's position that the contract applies to all litigation with passengers **except** tort claims makes no sense and is contrary to the passage contract itself. (Art. 21.)

B. The Maritime Choice of Law Principles Of *Lauritzen* And Its Progeny Were Developed And Have Been Applied In Entirely Distinguishable Maritime Litigation Contexts.

Traditional maritime tort choice of law rules under *Lauritzen* have developed **outside** the passenger litigation context. They were not intended to be used by a foreign cruise carrier as a vehicle to, in effect, overrule a century of precedent from *The Majestic* forward, and to abolish the "reasonable communication" requirement, which has developed **within** the unique federal maritime cruise passenger litigation context.

In *Lauritzen, supra,* 345 U.S. 571, 583-591, the Court outlined seven factors to be considered in deciding whether the Jones Act should be applied to a seaman's action against his maritime employer for personal injuries.[16] In *Romero, supra*, 358 U.S. 354, 382, another general maritime and Jones Act employment case, the Court stated that, "The broad principles of choice of law and . . . criteria . . . set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." In *Rhoditis, supra*, 398 U.S. 306, 309, another seaman case, the Court added an eighth factor — the shipowner's "base of operations," whatever its formal allegiance might be. The Court further held that the *Lauritzen* list of factors "was not intended to be exhaustive," and that the test was "not a mechanical one." 398 U.S. at pp. 308-309. The Opinion below and the choice of law ruling it upholds, fail to recognize that the importance to be given each choice of law factor varies on a case by case basis, depending upon the "totality of the circumstances." *Id.*, at p. 310.[17] Pet. App. 14a-17a. The "totality of the circumstances" necessarily involves consideration of the "rea-

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[16]The factors are: (1) the place of the wrongful act; (2) the law of the flag of the vessel; (3) the allegiance or domicile of the injured; (4) the allegiance of the defendant shipowner; (5) the place of the contract; (6) the inaccessibility of a foreign forum; and (7) the law of the forum. The second factor, the law of the flag of the vessel, was given primary importance therein. However, the law of the flag is given little weight if it is merely a flag of convenience. *Lauritzen, supra*, 345 U.S. at p. 587; *Sundance Cruises Corp. v. A.B.S.*, 7 F.3d 1077, 1082 (2nd Cir. 1993), *cert. denied,* 114 S.Ct. 1399, 128 L.Ed.2d 72 (1994).

[17]The Opinion fails to consider, for example, as part of the "totality of the circumstances," the existence of a binding carrier-passenger contractual relationship, federal maritime law and policy protecting the rights of American cruise passengers against unnoticed and non-communicated liability limitations, or the fact that about sixty (60) percent of the *OCEAN PEARL's* passengers were American citizens. See *Symonette Shipyards Ltd. v. Clark*, 365 F.2d 464, 467-468 (5th Cir. 1966), *cert. denied*, 387 U.S. 908 (1987) and *Mattes v. National Hellenic American Line*, S.A., 427 F.Supp. 619, 628 (S.D.N.Y. 1977), wherein the court considered the "national interest here in assertion of American law . . . [to protect] passengers whose well being is entrusted to the vessel's crew. Where the vast majority of the vessel's passengers are consistently American citizens, this country has an interest in extending its law. . . . " The Opinion below does not consider that CFC competes with other cruise companies for significant American business. *See Vavoules v. Kloster Cruise Ltd., supra*, 822 F.Supp 979, 980 (E.D.N.Y. 1993) and Footnote 11, *supra*. See also *Sigalas v. Lido Maritime, Inc.*, 776 F.2d 1512, 1519 (11th Cir. 1985): "***[T]he bulk of Lido's revenue comes from American pocketbooks. That alone is not enough to justify application of American law [in

sonable communication" requirement and federal maritime policy underlying that requirement, when a choice of law issue is raised in the context of cruise passenger litigation.

There are remarkably few cruise passenger litigation cases wherein the *Lauritzen/Rhoditis* analysis is even mentioned. The doctrine set forth in *Lauritzen* and *Rhoditis* is almost **exclusively** applied to cases involving maritime employment, merchant and commercial shipping, oil platform production, and the surveying and certifying of ocean-faring vessels. The reason is clear: federal maritime cruise passenger cases require a different analysis precisely because in this unique context, **all** actions against the carrier, whether sounding in tort or in contract, arise out of a passage contract that creates a unique maritime relationship. If the litigation arises out of an American passage contract, subject to interpretation under, and governed by, federal maritime law, "reasonable communication" of a carrier's intention to invoke liability limitations for passengers' losses under a foreign law or convention is a prerequisite to the carrier's ability to invoke such limitations. The carrier cannot circumvent this requirement by deliberate omission of a choice of law clause, or by non-communication of those liability limitations it intends to invoke, simply by the assertion of maritime tort choice of law principles designed **solely** to achieve such unnoticed liability limitations.

Prior to this case, the *Lauritzen/Rhoditis* analysis had never been utilized in a cruise passenger suit, to petitioners' knowledge, as part of the resolution of a choice of law challenge, where there had not been the prerequisite "reasonable communication" of the carrier's intent to invoke a foreign law or liability limitation thereunder. In *Hodes, supra,* 858 F.2d 905, 907, the carrier's intention to invoke the Athens Convention's limitations **was** incorporated into the contract, which had a forum selection clause and a choice of law clause specifying Italian law. *Id.*, at pp. 907; 915, fn.5. It was only after the court found such proper notice that it discussed broad choice of law principles in confronting a party's challenge to application of foreign law, despite the notice. Given that the passengers **were** given proper notice of the carrier's intention to invoke foreign law in the contract, the court observed: "American passengers simply do not carry

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this maritime employment death action by a Greek seaman]. Were this an American passenger the posture of the case might be quite different, ..."

American public policy on their backs wheresoever they may venture." *Id.*, at. p. 915. *Klinghoffer, et al. v. Achille Lauro, et al.*, 795 F.Supp. 112 (S.D.N.Y. 1992), discusses *Lauritzen* in connection with litigation against the Palestinian Liberation Organization, not the carrier, and in any event, involved the same contract as in *Hodes*, which clearly satisfied the "reasonable communication" requirement.[18]

This cruise passenger case is readily distinguishable from the many decisions applying *Lauritzen/Rhoditos* because they **all** involve maritime personal injury litigation in **vastly different** contexts. Petitioners are neither seamen seeking Jones Act benefits against a maritime employer, nor are they involved commercially in oil platform production, merchant shipping or the surveying of ocean-faring vessels. They are U.S. citizens, who entered into a binding maritime contract of passage in their home country. The contract applies to this litigation and addresses the carrier's "Liability Limitations" for the losses for which damages are sought in this litigation. For the first time, a carrier has proceeded alternatively under *Lauritzen* to achieve liability limitations, after a court applying federal maritime law, has conceded the contract does not meet the "reasonable communication" standard. It will not be the last time. See Fn. 10, *supra*. If the Opinion below is correct, that a foreign flagged vessel carrier can achieve by deliberate omission that which other carriers have heretofore achieved by virtue of "reasonable communication" and fair notice, then there is no longer **any** reason for carriers to attempt to comply with the rules that have developed since *The Moses Taylor, supra,* 71 U.S. (4 Wall) 411 and *The Majestic, supra,* 166 U.S. 375. With the conflict within maritime law precedent that now exists, it is apparently that which is **not** noticed or communicated **at all** in the contract that can control and define the carrier-passenger relationship and litigation arising out of the cruise passage.

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[18]Thus, the *Hodes* and *Klinghoffer* cases to which the Opinion below refers at Pet. App. 9a, do not provide support for the notion that choice of law in this unique maritime context can be resolved by way of a *Lauritzen/Rhoditis* analysis precisely because of the absence of an affirmative choice of law clause in the passage contract. In another case to which the Opinion refers, *Caruso v. Italian Line, supra*, 184 F. Supp. 862, 863, the court was confronted with an Italian passage contract, purchased in Italy, which contained an express choice of law provision that Italian law would control.

This Court should asses the integrity of the judicial analysis utilized below, since it is undisputed that: (1) U.S. maritime law principles govern the interpretation of, and force and effect to be given to, the passage contract whose terms itself state that it controls in this litigation; (2) It is U.S. maritime law and policy which govern any choice of law issues raised by the carrier in its attempt to assert liability limitations against petitioners; (3) It is custom and practice, in conformity with established maritime principles, for carriers issuing passage contracts in the U.S. for foreign **and** domestic cruises, to "reasonably communicate" any intention to rely upon a foreign law or liability limitations arising under a foreign convention, or its intention to limit litigation against it to a foreign forum; (4) The carrier seeks to invoke the application of a foreign convention under foreign law **only** to the extent that it allows the carrier to limit its liability for the catastrophic injuries and damages suffered by its American passenger; and (5) The carrier otherwise stands by the terms of the passage contract that it drafted, and is content to rely upon U.S. law to govern all **other** substantive and procedural aspects of this litigation.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that this Court should resolve the deep conflict that now exists within federal maritime law and policy. It is one that will surely undermine and unravel the sound federal maritime principles relating to the passenger-carrier relationship that have developed over the last century, and that heretofore have served to protect legitimate interests of both the carrier and the passenger. The questions of national and international importance that have been raised in this most serious case warrant determination by this Court.

Dated: August 12, 1997

Respectfully submitted,

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SALLY B. KIRMAN and
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APPENDIX TO PETITION

SECOND APPELLATE DISTRICT
DIVISION THREE
NO. B096258

S060216

IN THE SUPREME COURT OF CALIFORNIA

SALLY B. KIRMAN, *et al.*,
Appellants,

v.

COMPAGNIE FRANCAISE DE CROISIERES,
Respondent.

SUPREME COURT
FILED
MAY 21, 1997
Robert Wandruff, Clerk
DEPUTY

Appellants' petition for review DENIED.

GEORGE
Chief Justice

CONSENT ORDER

Kentwood Ltd., v. U.S. (E.D. Va. 1996) 1997 AMC 231, 930 F.Supp. 227. Vacated by the United States District Court for the Eastern District of Virginia, February 15, 1997.

J. CALVITT CLARK, JR., D.J.:

By agreement of the parties and for good cause shown, the Court vacates its Memorandum and Order entered June 19, 1996.

SUMMARY AFFIRMANCE

Kirman v. Compagnie Francaise de Croisieres (CalSuperCt 1993). 1994 AMC 2848. Affirmed by unpublished opinion by California Court of Appeal, Second Appellate District, February 26, 1997.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

In the Court of Appeal

OF THE

State of California

SECOND APPELLATE DISTRICT

DIVISION THREE

SALLY B. KIRMAN, *et al.*,
Plaintiffs and Appellants,

v.

COMPAGNIE FRANCAISE DE CROISIERES,
Defendant and Respondent.

B096258
(Super. Ct. No. BC033403)

COURT OF APPEAL — SECOND DIST.
FILED
FEB. 26, 1997
Joseph A. Lane, Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Richard C. Neal, Judge. Affirmed.

Stolpman, Krissman, Elber, Mandel & Katzman, Donna Silver and Leonard H. Mandel, for Plaintiffs and Appellants.

Lillick & Charles, Ann G. Miller and Walter T. Johnson, for Defendant and Respondent.

This is a maritime tort action involving a choice-of-law determination. Cruise ship passengers, plaintiffs, and appellants Sally Kirman and John Kirman (Kirmans) brought an action for damages against cruise ship operator, defendant and respondent Compagnie Francaise De Croisieres (CFC) after Sally Kirman suffered serious injuries in an on-board accident. The trial court granted CFC's motion for summary adjudication, applied American general maritime law, and determined the law of the Bahamas and the liability

limitations under the Athens Convention applied to this case. The trial court granted CFC's motion for entry of judgment. The Kirmans appeal.

We find the trial court correctly applied controlling tort choice-of-law principles enunciated in *Lauritzen v. Larsen* (1953) 345 U.S. 571 and *Hellenic Lines v. Rhoditis* (1970) 398 U.S. 306 to conclude Bahamian law, and the Athens Convention liability limitations, governed this case.[1] Accordingly, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 1991, California residents Sally and John Kirman booked passage on the M/V OCEAN PEARL for a cruise from Singapore to Australia. The vessel, which sailed under the Bahamian flag, was owned by a Swiss corporation, and operated by CFC, a French corporation. CFC had neither United States ownership interests in the corporation, nor offices or employees in the United States. The corporation's base of operations was in Paris, France. The OCEAN PEARL operated primarily in the Far East, the South Pacific, and the Indian Ocean, and did not call at ports in the United States. Annual repairs and maintenance for the vessel were performed in Singapore. The tickets were purchased in California, and contained neither an explicit choice of law provision nor language regarding liability limitations for injuries.[2]

On March 4, 1991, while the ship was anchored in Indonesian waters off the coast of Bali, Sally Kirman slipped and fell and hit her head on the promenade deck. On March 10, 1991, as the OCEAN PEARL docked in Darwin, Australia, Sally Kirman was found unconscious in her cabin. Doctors in Darwin performed surgery to remove a subdural hematoma. Sally Kirman sustained permanent brain injury.

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[1] The "Athens Convention" referred to in this case includes the "Convention Relating to the CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA", dated December 13, 1974, and the amendments, referred to as "PROTOCOL to Amend the Athens Convention Relating to the CARRIAGE OF PASSENGERS AND THEIR BAGGAGE BY SEA," dated March 29, 1990.

[2] Article 18(a) of the Vessel Passage Contract Terms states that "[f]or Loss of Life or Injury The liability of the Company [CFC] for loss of life of or injury to a passenger shall not exceed that provided by law."

On July 23, 1991, the Kirmans filed a complaint for damages in Los Angeles Superior Court alleging causes of action for negligence and products liability.[3]

On August 20, 1993, CFC moved for summary judgment, or in the alternative, summary adjudication of issues, and sought a determination, among others, that the case was governed by Bahamian law, and specifically the liability limitations of the Athens Convention. CFC asserted that in the absence of a ticket provision that informed passengers that disputes and liability would be governed by particular law, the appropriate law was determined by applying the maritime choice of law principles enunciated in *Lauritzen v. Larsen, supra,* 345 U.S. 571. Under the facts of this case, CFC contended, a *Lauritzen* analysis would lead to the conclusion great weight should be given to the fact the OCEAN PEARL flew the Bahamian flag. Furthermore, CFC contended, Bahamas was a signator to the Athens Convention and adhered to its limitation of liability provisions.[4] In opposition[5], the Kirmans argued they could not be bound by Bahamian law or the terms of the Athens Convention because CFC failed to "reasonably communicate," on the ticket or otherwise, the fact and nature of the liability limitations. The Kirmans

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[3]The Kirmans named CFC, Ocean Cruise Lines, Inc., Pearl Cruises, Pearl Cruise Lines, Pearl Cruises of Scandinavia Inc., Orient Lines, Inc., and Paquet Lines as defendants in this action. After confirming only CFC was involved with the maintenance, operation and control of the OCEAN PEARL, the Kirmans dismissed all defendants except for CFC and Ocean Cruise Lines, Inc. This matter proceeded only as to CFC and Ocean Cruise Lines, Inc.

[4]Under terms of the Athens Convention,

Article 2 states, "1. This Convention shall apply to any international carriage ['the period during which the passenger and/or his cabin luggage are on board the ship'] if: [¶] (a) the ship is flying the flag of or is registered in a State Party to this Convention, ..."

Article 7 states: "1. The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 700,000 francs per carriage, ..." The Article was amended to read: "The liability of the carrier for the death of or personal injury to a passenger shall in no case exceed 175,000 units of account per carriage." A "Unit of Account" was then defined pursuant to specific calculations and a nation's currency value.

Article 14 states: "No action for damages for the death of or personal injury to a passenger . . . , shall be brought against a carrier or performing carrier otherwise than in accordance with this Convention."

[5]The Kirmans did not oppose the motion as to Ocean Cruise Lines, Inc., and the defendant was subsequently dismissed from the action.

further argued since the only legal references on the ticket were to United States statutes regarding claim limitations periods and maritime remedies, it could be implied the parties intended American law to govern any disputes.[6]

On September 27, 1993, the trial court summarily adjudicated the issue as to the applicability of Bahamian law in favor of CFC. The court analyzed choice of law considerations in *Lauritzen v. Larsen, supra,* and determined, in relevant part: "Principal weight is given to the law of the flag both because of concerns of comity or respect by one nation for the sovereignty of others [citation], and to afford shipowners and operators certainty and predictability as to which law will govern their conduct . . . . [¶] The other relevant factors mentioned in *Lauritzen* provide no 'counterweight' or basis in the current case to depart from the rule that the law of the flag shall govern shipboard torts."

The Kirmans filed a petition for writ of mandate/prohibition (B079277) on the choice of law issue that this court denied on November 23, 1993. On February 10, 1994, our Supreme Court denied the Kirmans' petition for review.

On May 22, 1995, CFC moved for entry of judgment based on its offer of judgment in the full amount under the Athens Convention. The trial court granted CFC's motion and judgment was entered in favor of the Kirmans on June 7, 1995.[7]

On August 29, 1995, the Kirmans filed a notice of appeal.

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[6] Article 20 of the passenger ticket states, in relevant part: "THE LIMIT ON SUITS Suit to recover on any claim against the Company shall be instituted: [¶] (a) As to claims mentioned in subdivision (a) of Article 19 above [loss of life or injury] within 1 year from the day when the loss of life or injury occurred, in accordance with Section 4283A of the Revised Statutes of the United States."

Article 23 states: "HIMALAYA CLAUSE The passenger agrees that all rights, exemptions from liability, defenses and immunities of whatever kind referred to in this Passage Contract which may be invoked by the Company shall automatically inure for the benefit of the owner . . . , except where Section 4287 of the Revised Statutes of the United States shall apply."

[7] The judgment read: "IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs JOHN KIRMAN and SALLY KIRMAN, husband and wife, jointly shall recover *$72,668* from defendant COMPAGNIE FRANCAISE DE CROISIERES and that this Judgment shall be without prejudice to rights of the parties to contest the issue of liability if there should be further proceedings in this matter following appeal."

DISCUSSION

Under the Choice of Law Factors Set Forth in Lauritzen v. Larsen, Supra, the Trial Court Properly Determined Bahamian Law Applied in This Case.

The sole issue in this appeal involves choice of law. The question is whether the trial court correctly determined that the law of the Bahamas and the limitation of liability provisions in the Athens Convention were controlling. The trial court's conclusion is a question of law subject to de novo review by this court. (*Pereira v. Utah Transport, Inc.* (9th Cir. 1985) 764 F.2d 686, 689; *Phillips v. Amoco Trinidad Oil Co.* (9th Cir. 1980) 632 F.2d 82, 84.)

1. *General Principles*

This is a maritime tort action. Federal choice of law principles determine applicable law in maritime actions. [Citations.] (*Romero v. International Term. Co.* (1959) 758 U.S. 354, 382-383; *Sundance Cruises Corp. v. American Bureau of Shipping* (2d Cir. 1993) 7 F.3d 1077, 1081-1082.) "In developing and formulating 'approved rules of the general maritime law,' the federal courts are necessarily confronted, from time to time, with choice of law problems; and the rules for determining such choices become themselves a part of the general maritime law as understood and applied in the United States." (*Jansson v. Swedish American Line* (1st Cir. 1950) 185 F.2d 212, 218.)

The basic purpose of a choice, or conflict, of law doctrine, "is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum." (*Lauritzen v. Larsen, supra*, 345 U.S. at p. 591.) "In developing the body of rules governing choice of law problems, the ideal in view is the recognition, by common consent of the states and nations having civilized systems of law, of a proper substantive law of the transaction at hand, to be uniformly applied regardless of the forum in which the litigation happens to be instituted. No doubt this ideal cannot be fully realized without the aid of international convention. But measurable advances have been made; and further progress to that end is possible if courts would not be too predisposed to apply the law of the forum with which they are

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On September 1, 1995, the judgment was amended to provide for plaintiffs' recovery of $14,230.55 in allowable costs.

of course most familiar, instead of candidly examining to see whether the transaction as a whole, in its most important aspects, is not centered in some other jurisdiction, whose law would therefore more appropriately be selected as the applicable law." (*Jansson v. Swedish American Line, supra*, 185 F. Supp. at p. 219.)

With these legal principles in mind, we examine the position of the parties.

2. *Kirmans' Contentions*

The premise of the Kirmans' argument is that the asserted maritime tort, to wit, Sally Kirman's fall, arose out of the performance of the terms of the contract ticket of passage. To this end, the Kirmans basically contend the passenger ticket is a maritime contract whose terms and conditions must be interpreted according to United States law. Under American general maritime law, the Kirmans argue, CFC cannot limit its liability for personal injury damages because it failed to "reasonably communicate" its intention to do so in the terms of the ticket. To support their position, the Kirmans cite numerous cases involving interpretation of contractual limitation of liability clauses and statute of limitation provisions. Under the facts of this case, Kermans' legal authorities are inapposite and their position based on a faulty premise.

The Kirmans argue that the liability limitation in the Athens Convention cannot be applied because they did not receive notice of its application in their tickets. The Kirmans confuse contract law with choice of law principles. This is not an action on a contract. Neither party is seeking to enforce the terms of the ticket. An analysis of the passenger ticket would be relevant only if one of the parties were seeking to enforce a specific term of the ticket, such as a forum selection or a choice of law provision, or a contractual clause limiting the time to bring an action or limiting the liability of the owners of the vessel. If the Kirmans were seeking to enforce a term in the ticket, then contractual choice of law would govern the rights and responsibilities of the parties, and the concepts of notice and reasonable communication would be applicable. That is not this case.

Where the choice of law determination depends on the enforcement of a contractual choice of law clause, courts properly consider the "reasonable communicativeness" of the terms of the passenger ticket to be a threshold question. (See *Milanovich v. Costa Crociere,*

S.p.A. (D.C. Cir., 1992) 954 F.2d 763, 768, fn. 9) However, some courts have considered a choice of law clause to be a relevant but not a determinative factor, and where choice of law does not depend on a contractual provision, no consideration is given to the question of notice. Some courts have decided not to enforce a choice of law provision and have instead engaged in a choice of law analysis using the *Lauritzen/Rhoditis* factors. (See *Lauritzen v. Larsen, supra,* 345 U.S. 571, *Hellenic Lines v. Rhoditis, supra,* 398 U.S. 306; *Klinghoffer v. S.N.C. Achille Lauro* (S.D.N.Y. 1992) 795 F. Supp. 112). While a choice of law clause cannot be considered at all unless it was reasonably communicated to the passenger, a complete failure to communicate would not bar the application of whatever law would otherwise apply under maritime choice of law principles. (See *Caruso v. Italian Line* (S.D.N.Y. 1960) 184 F. Supp. 862.)

The Kirmans next contend that references in the ticket to Revised statutes sections 4283A and 4287 *implied* an agreement that United States law should govern.[8] We disagree. This contention was rejected in *Jansson v. Swedish American Line, supra,* 185 F.2d at pages 218, 220, because the statutes failed to manifest a mutual intention that American law should apply, and we have found no legal authority that has held otherwise. Furthermore, the statutes only provide passengers procedural rights, not substantive choice-of-law rights.

In *Jansson, supra*, an American citizen filed a negligence action against a Swedish shipowner for injuries he suffered from a fall that occurred while boarding the vessel in Sweden. (*Id.* at p. 214.) The district court granted summary judgment in favor of the defendant on grounds that Jansson failed to file the complaint "within one year after the date of the injury, as required by a provision of the ticket or

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[8] Revised statutes section 4283A, now 46 U.S.C.A. section 183b, provides for a minimum period of time in which action can be brought for injury or death of a ship passenger. (*Schwartz v. S.S. Nassau* (2d Cir. 1965) 345 F.2d 465.) The statute was designed to prevent shipowners from imposing on passengers unreasonably short periods of limitation on actions for personal injury. (*Barrette v. Home Lines, Inc.* (S.D.N.Y. 1958) 168 F.Supp. 141.)

Revised statutes section 4287, now 46 U.S.C.A. section 187, reserves remedies against parties other than shipowners. "The purpose of the limitation act is to release the ship owner from some liability for conduct of the master and other agents of the owner for which these parties were themselves liable. [Citation.]" (*In the Matter of Brent Towing Co. Inc.* (N.D. Fla. 1975) 414 F.Supp. 131, 132.)

contract of transportation." (*Ibid*) The court determined that "the one-year contractual limitation fell just within the permissive limit sanctioned by § 4283A of the Revised Statutes, ... [¶] In the ruling ... the court apparently treated the matter as a point of 'American law', ..." (*Id.* at p. 215.) However, the appellate court determined, after considering all points of contact the incident had with both the Swedish and American jurisdictions, under substantive maritime law, the issue of defendant's liability was a matter of Swedish law. (*Id.* at p. 220.)

On appeal, Jansson argued, since there was no specific choice of law provision, that "the reference to § 4283A of the Revised Statutes of the United States contained in the printed condition on the back of the ticket indicates that the parties intended the validity and binding effect of the stipulation to be governed by American, rather than Swedish, law, and that for this reason American law should be controlling, ..." (*Id.* at p. 218.) The court disagreed and explained that it was "unrealistic to say that 'the parties' intended their rights and obligations to be governed by one law or another. ... In the absence, then, of a clearly manifested *mutual intention* that American law should determine whether the printing on the back of the ticket was a part of the contract and whether as such it was valid and binding, we might say that these questions must be determined by the law of Sweden, ..." (*Id.* at p. 219.)

Furthermore, the court explained that "[t]he act of Congress referred to on the back of the ticket, ... , is not a statute of limitation. It does not say, in effect, that no American court shall entertain an action on a foreign tort unless commenced within one year, even though the liability is still a subsisting one by the law of its creation. The statute says that it shall be unlawful for a shipowner to contract for a shorter period than one year within which suit must be brought, but it does not command American courts to apply American law in determining whether the language on the back of the ticket is a part of the contract of carriage and as such valid and binding upon the passenger." (*Id.* at p. 220, fn. omitted.)

These revised statutes only afford passengers procedural rights, and not substantive choice of law rights. "...[A] foreign vessel owner has the right to invoke limitation of liability in an American court. Section 183 of the Act permits limitation by 'the owner of any vessel whether foreign or domestic.' ..., [I]n The Titanic *[Oceanic Steam Navigation Co. v. Mellor* (1914) 223 U.S. 718], the [United States

Supreme] [C]ourt held that foreign shipowners seeking to limit liability are bound by the limitation amount under American law, regardless of the law creating the underlying liability. [¶] . . . The limitation statute in whatever country never creates tort or other liability; the creation of the duty that results in liability always proceeds from some other statutory or common law right. In other words, a limitation statute, whether under American law or foreign law, does not impose liability, it merely limits liability.... [¶] Thus in virtually all cases involving foreign flag vessels or foreign shipowners, the rule of *The Titanic* will apply: a foreign vessel or shipowner may invoke limitation of liability under American law because limitation is a procedural right determined by the law of the forum . . . . An American decree of limitation has no extraterritorial effect, and claimants can still bring suit in the courts of a foreign state." (Schoenbaum, Thomas J., "Limitation of Liability," *Admiralty and Maritime Law (2d ed. West Publishing Co., 1994)*, Ch 15, pp. 302-303, fns. omitted.)

In addition, "[t]he shipping laws of the United States, set forth in Title 46 of the United States Code, comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies. While some have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application and are in general terms which leave their application to be judicially determined from context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law." *(Lauritzen v. Larsen, supra,* 345 U.S. at p. 577.)

Sections 4238A and 4287 are a part of this comprehensive body of regulations, and were enacted to prohibit ship owners from attempting to unreasonably limit their obligations towards passengers. *(Jansson v. Swedish American Line, supra,* 185 F.2d at p. 207; see also *Scheibel v. Agwilines* (2d Cir. 1946) 156 F.2d 636, 637-638, fn. 2.) These statutes acknowledge, under certain circumstances, the existence of certain passenger rights. They are not choice of law provisions. They do not imply an intention that United States law should apply, but merely a recognition that in some instances it might apply.

As a final note, under the facts of our case, the Kirmans could not invoke the protection of these statutes, because they only become applicable when a ship cruises "between parts of the United States or between any such port and a foreign port." (§§ 138b, 138c.) The OCEAN PEARL did not dock at any United States port.

Therefore, in our analysis, we only consider the law applicable to Sally Kirman's accident, and not the law applicable to interpretation of the passenger ticket.

In contrast to the Kirmans' contractual argument, CFC contends the choice of law issue in this case is governed by the substantive law of the Bahamas under the *Lauritzen/Rhoditis* choice of law principles. We agree. Now we determine, by the application of relevant tort choice-of-law criteria, whether Bahamian law applies under the facts in this case.

3. *Choice of Law*

(a) *Lauritzen and Rhoditis*

The relevant considerations for maritime choice-of-law determinations are enumerated and applied in *Lauritzen v. Larsen, supra,* 345 U.S. 571 and *Hellenic Lines v. Rhoditis, supra,* 398 U.S.306.[9]

Lauritzen lists seven factors: "(1) the place of the wrongful act; (2) the law of the flag; (3) the allegiance or domicile of the injured seaman; (4) allegiance of the defendant shipowner; (5) the place where the contract of employment was made; (6) the inaccessibility of a foreign forum; and (7) the law of the forum." (*Hellenic Lines v. Rhoditis, supra,* 398 U.S. at p. 308.) The purpose in considering these factors, *Lauritzen* explained, was because "[i]nternational or maritime law . . . aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, . . . , has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of

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[9] In *Lauritzen* and *Rhoditis*, the Supreme Court developed factors to be considered in deciding the applicability of the Jones Act to a seaman's claim for injuries. However, "[t]hose principles have been declared equally applicable to cases arising under the General Maritime Law. [Citations.]" (*Jones v. The Vessel Nair* (S.D.Cal.) 612 F.Supp. 414, 416; *Phillips v. Amoco Trinidad Oil Co., supra,* 632 F.2d 82, 85-86, fn. 3; see also *Romero v. International Term. Co., supra* 358 U.S. at p. 382.)

contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority .... [¶] ... We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them." (*Lauritzen v. Larsen, supra*, 345 U.S. at pp. 582-583.)

Rhoditis determined "the list of seven factors in *Lauritzen* was not intended as exhaustive[, and] the shipowner's *base of operations* is another factor of importance...." (*Hellenic Lines v. Rhoditis, supra,* 398 U.S. at p. 309.) *Rhoditis* also stressed that "[t]he *Lauritzen* test, ..., is not a mechanical one." (*Id.* at p. 308.)

In *Phillips v. Amoco Trinidad Oil Co., supra,* the Ninth Circuit interpreted "the *Lauritzen* standards [and] stressed that, in general, the law of the flag is more important than most of the other factors, and at the other end of a sliding scale of importance were inaccessibility of the forum and law of the forum. The test is not a mechanical one, ..., and depending on the facts of the case, some factors have been given a greater degree of consideration than others. [Citation.]" (*Jones v. The Vessel Nair, supra,* 612 F.Supp. at p. 416.)

In *Romero v. International Term. Co., supra,* 358 U.S. at pages 382-383, a case involving a seaman's claim under the Jones Act, the United States Supreme Court found applicable the reasoning and factors of *Lauritzen* and observed that "we must apply those principles of choice of law that are consonant with the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community. These principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicti commissi.* The controlling considerations are the interacting interests of the United States and of foreign countries, and in assessing them we must move with the circumspection appropriate when this Court is adjudicating issues inevitably entangled in the conduct of our international relations."

In light of these principles, we apply the *Lauritzen/Rhoditis* factors to our case.

(b) *Application of Factors*

In considering the first factor, *place of the wrongful act,* "[t]he solution most commonly accepted as to torts in . . . international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi*. . . . The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. . . . [¶] . . . [T]he territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag." (*Lauritzen v. Larsen, supra*, 345 U.S. at pp. 583-584, fns. omitted.) Accordingly, "the place of injury, typically is not emphasized . . . . [Citation.]" (*Villar v. Crowley Maritime Corp.* (9th Cir. 1986) 782 F.2d 1478, 1480.) In this case, the accident occurred in Indonesian waters off the coast of Bali, nowhere near the United States. This factor weighs against the application of American law. We find it of little significance.

The second factor, *the law of the flag*, is considered to have "cardinal importance." (*Lauritzen v. Larsen, supra*, 345 U.S. at p. 584.) The United States Supreme Court "has said that the law of the flag supersedes the territorial principle, . . . , because it 'is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' " (*Id.* at p. 585.) Furthermore, the Lauritzen court determined "that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States v. Flores*, . . . : [¶] 'And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. . . . ' [¶] This was but a repetition of settled American doctrine." (*Id.* at pp. 585-586, fns. omitted.)

In *Bilyk v. Vessel Nair* (9th Cir. 1985) 754 F.2d 1541, 1545, the Ninth Circuit stated unequivocally that "*Lauritzen* itself mandates that the law of the flag controls, unless other factors point decidedly in a different direction, *see* 345 U.S. at 586, . . ." However, the law of the flag is given little weight when it is only a flag of convenience." (*Lauritzen v. Larsen, supra,* 345 U.S. at p. 585.) There is neither evidence nor argument in our case that the vessel flew the Bahamian flag merely for convenience. In our case, the OCEAN PEARL is registered in and flies the flag of the Bahamas. This factor weighs in favor of Bahamian and against American law and "must prevail unless some heavy counterweight appears." (*Lauritzen v. Larsen, supra,* 345 U.S. at p. 586.)

The third factor, *the allegiance or domicile of the injured,* is an important consideration because "each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support." (*Lauritzen* at p. 586; see also *Villar v. Crowley Maritime Corp., supra,* 782 F.2d at p. 1481; *Pereira v. Utah Transport, Inc., supra,* 764 F.2d at p. 689.) In this case, Sally Kirman is a United States citizen. Her argument seems to be that as an American citizen she should be able to invoke the laws of the United States in suing foreign entities. However, under the facts of this case, Sally Kirman's citizenship is one of the *only* factors that weighs in favor of American law, and it is not the dominant factor. (See *Bilyk v. Vessel Nair, supra,* 754 F.2d at pp. 1544-1545.) ". . . , *Rhoditis* and *Phillips* clearly establish that in the Ninth Circuit, citizenship is but one of the factors that should be considered." (*Jones v. The Vessel Nair, supra,* 612 F. Supp. at p. 417.)

The fourth factor, *allegiance of the defendant shipowner,* is sometimes difficult to determine because "it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries. Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them." (*Lauritzen v. Larsen, supra,* 345 U.S. at p. 587, fns. omitted.) In this case, the OCEAN PEARL is registered in the Bahamas, owned by a Swiss corporation, has no American ownership interests, and does not stop in any U.S. ports. The vessel's prior

owner was a Bahamian corporation. These facts are undisputed. This factor weighs against the application of American law.

The fifth factor, *the place of contract,* was California, where the Kirmans purchased the passenger tickets. It seems to be an important factor on which the Kirmans rely to invoke American law. Even though this factor "is one which often has significance in choice of law in a contract action" (*Lauritzen* at p. 588), as previously discussed, this is not a contract action. The Kirmans do "not seek to recover anything due under the contract or damages for its breach." (*Ibid.*) "The Ninth Circuit has said that '[f]or claims not on the contract, the *Lauritzen* Court found this factor useful *only insofar as the contract stipulated whose law would apply.* [Citations.]" (*Butler* v. *Ben Line Steamers Ltd.* (C.D. Cal. 1986) 664 F.Supp. 1367, 1369.) In this case, the Kirmans have filed a maritime tort action and the passenger ticket is silent as to choice of law. As *Lauritzen* observed, "[w]e do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort." (345 U.S. at p. 589.) We find this factor to have no significance.

The sixth factor, *the inaccessibility of a foreign forum*, is irrelevant in this case. The Kirmans are California residents. The case is being tried in a California court where Bahamian law can be used to adjudicate the issues. (*Lauritzen* v. *Larsen, supra,* 345 U.S. at pp. 589-590.)

The seventh factor, *the law of the forum*, is not given great weight because "the fact that an American forum has perfected jurisdiction over the parties is no justification for imposing American law on a case that may have little connection to the United States. [Citation.]" (*Pereira* v. *Utah Transport, Inc., supra,* 764 F.2d at p. 689.) *Lauritzen* stated that "[w]e have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. [Citations.] The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable." (*Lauritzen v. Larsen, supra,* 345 U.S. at pp. 590–591.)

Even if we seriously considered an inquiry into "law of the forum," this factor would invoke an analysis of the competing policies of the forum state and the foreign states whose law might apply. Such a comparison, as a basis for choosing law, was rejected by the court in *Lauritzen* who stated that we "do [not] stop to inquire which law does whom the greater or the lesser good." (*Id.* at p. 593) Furthermore, giving primacy to a determination that American law is superior, would convert a choice-of-law determination into a power exercise that would run counter to principles of comity, certainty, and uniformity that represent the purpose of choice-of-law.

The final factor, the *base of operations* test added by *Rhoditis,* is irrelevant in this case. CFC's base of operations is in Paris, France, and the OCEAN PEARL is serviced and maintained in Singapore. The vessel's base of operations is in the Far East, the South Pacific, and the Indian Ocean, and it does not stop in any United States ports. The Kirmans do not contend otherwise.

(c) *Conclusion*

After analyzing the facts of our case according to choice of law principles and the *Lauritzen/Rhoditis* criteria, we conclude the law of Bahamas, and not that of the United States, applies in this case. The only considerations that weigh in favor of the application of American law are Sally Kirman's citizenship and the location of the ticket purchase. However, as previously discussed, neither of these factors can be afforded any determinative weight. As *Lauritzen* observes, we do not "stop to inquire which law does whom the greater or the lesser good." (*Lauritzen* at p. 593.)

Lauritzen mandates that unless other criteria point in a different direction, the law of the flag presumptively controls. The Kirmans have been unable to rebut that presumption. Therefore, under the facts of this case, we find the law of the flag controlling. The trial court properly determined that Bahamian law and the liability limitations of the Athens Convention were to be applied in a decision in this matter.

DISPOSITION

The judgment is affirmed. CFC is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.

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Superior Court
OF THE
State of California
For the County of Los Angeles

SALLY KIRMAN and JOHN KIRMAN,
Plaintiffs,

VS.

COMPAGNIE FRANCAISE DE CROISIERES; *et al.*,
Defendants.

CASE NO.: BC 033403

ORIGINAL FILED
SEP 01 1995
LOS ANGELES SUPERIOR COURT

STIPULATION TO CORRECT JUDGMENT TO INCLUDE RECOVERY OF ALLOWABLE COSTS BY PLAINTIFFS AND ORDER THEREON

IT IS HEREBY STIPULATED by and between plaintiffs SALLY KIRMAN and JOHN KIRMAN and defendant COMPAGNIE FRANCAISE DE CROISIERES, by and through their respective attorneys of record, as follows:

That the Judgment (Exhibit "A" hereto) entered in this case on June 7, 1995, Notice of Entry of which was served by defendant Compagnie Francaise De Croisieres on July 6, 1995, be corrected to include the following additional language:

"Plaintiffs, as the prevailing party, are entitled to the recovery of allowable costs, in the amount of $14,230.55, pursuant to the Memorandum of Costs filed by plaintiffs on June 23, 1995."

Dated: August 14, 1995

STOLPMAN, KRISSMAN, ELBER, MANDEL & KATZMAN

By: DONNA SILVER

Donna Silver
Attorneys for Plaintiffs
SALLY KIRMAN and
JOHN KIRMAN

Dated: August 15, 1995

LILLICK & CHARLES

By: WALTER JOHNSON

Walter Johnson
Attorneys for Defendant
COMPAGNIE FRANCAISE DE
CROISIERES

ORDER

The foregoing Stipulation is approved and IT IS ORDERED that the Judgment entered on June 7, 1995 is hereby modified to provide for plaintiffs' recovery of allowable costs of $14,230.55.

Dated: September 1, 1995

RICHARD C. NEAL

The Honorable Richard Neal
Judge of the Superior Court

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In the Superior Court
FOR THE
State of California
IN AND FOR THE COUNTY
OF LOS ANGELES

SALLY KIRMAN and JOHN KIRMAN,
Plaintiff,

VS.

COMPAGNIE FRANCAISE DE CROISIERES, *et al.*,
Defendants.

NO. BC 033403
JUDGMENT
Hearing Date: 6/7/95
Time: 9:00 a.m.
Dept: 22
Trial Date: 6/6/95
Dept: 22

FILED
LOS ANGELES SUPERIOR COURT
JUN 07 1995
JOHN A. CLARKE, CLERK
BY G.E. POOKS, DEPUTY

IT IS HEREBY ORDERED AND ADJUDGED that plaintiffs JOHN KIRMAN and SALLY KIRMAN, husband and wife, jointly shall recover $72,668 from defendant COMPAGNIE FRANCAISE DE CROISIERES and that this Judgment shall be

without prejudice to rights of the parties to contest the issue of liability if there should be further proceedings in this matter following appeal.

Dated: June 7, 1995

RICHARD C. NEAL

Judge of the Superior Court

Therefore, the Court will deny American Dredging's summary judgment motion on the issue of precluding non-pecuniary damages because there has been no presentation of evidence that, as a matter of law, the claimants seeking recovery for non-pecuniary damages are not dependents of the decedents. Accordingly, it is ordered and adjudged that the claimants' motion for summary judgment on the issues of exoneration and limitation of liability is granted. It is further ordered and adjudged that the claimants' motions for oral argument on their motion for summary judgment are denied. Finally, it is ordered and adjudged that American Dredging's Motion for Summary Judgment on the issue of non-pecuniary damages is denied.

SALLY KIRMAN, *et al., Plaintiffs,*

v.

COMPAGNIE FRANCAISE DE CROISIÈRES, *et al., Defendants.*

California Superior Court, County of Los Angeles,
September 27, 1993
No. BC 033 403

Petition for Writ of Mandate — Prohibition denied, November 23, 1993.

Petition for review denied by California Supreme Court, February 10, 1994.

CONTRACTS — 111. Choice of Law and Forum Provisions — DAMAGES — 111. What Law Governs — PASSENGERS — 12. Passage Contract — 127. Breach, Damages, Refund of Passage Money — PERSONAL INJURY — 117. Foreign Vessels and Law — 118. International Conventions.

A ticket provision for application of Bahamian law is reasonable and binds a U.S. passenger on a Bahamian-flag vessel owned by a Swiss corporation and based in Paris, with respect to an injury between Singapore and Australia, and the passenger's claim is governed by the Athens Convention, to which Bahamas is a party and which is reasonable in setting a limit of $75,000 damages, which is not a contract limit but a rule of law. Americans cannot

expect to carry U.S. law and policy with them as they travel about the world.

Donna Silver (Silver McWilliams Stolpman Mandel Katzman Krissman & Elber) *for Plaintiffs*

Ann Gray Miller and Walter T. Johnson (Lillick & Charles) *for Defendants*

RICHARD C. NEAL, J.:

This matter came on for hearing September 22, 1993, plaintiffs appearing by Donna Silver, and defendants by Ann Miller and Walter Johnson.

The case arises out of an injury aboard a cruise ship, the *Ocean Pearl*. Plaintiff Sally Kirman slipped, fell, struck her head, and sustained serious injuries.

The following facts are undisputed. Plaintiffs are residents of California, and purchased their tickets through a ticketing agency, Ocean Cruise Lines (OCL), in California.

The tickets contain no "choice of law" clause selecting which nation's law will apply to any dispute arising under the ticket or out of the voyage. Likewise, the tickets contain no language to notify plaintiffs of any limitation on the damages they might recover if injured as a result of negligence of the owner or operator of the ship, and plaintiffs were never provided such notification by oral or written communication outside the ticket language.

At the time of the accident the *Ocean Pearl* was anchored off Bali. The vessel at the time was on a voyage from Singapore to Australia. The vessel is owned by a Swiss concern, and operated by defendant Compagnie Française (CFC). The vessel is registered in the Bahamas, the so called "flag" jurisdiction. She is based in Paris, and maintained at intervals in Singapore. She never calls at US ports, and has not done so for many years.

The complaint is in four counts for general negligence (count 1), and products liability (counts 2, 3, and 4). Damages for loss of consortium are sought on behalf of plaintiff John Kirman.

Both defendants have moved for summary adjudication of various issues.

Plaintiff concedes that defendant OCL should be dismissed, based on the showing made in support of the motion, and the court accordingly orders such dismissal without further discussion, save a "thanks" to plaintiff's counsel for forthrightness consistent with the best tradition of the profession.

Defendant CFC urges:

— the action should be governed by the law of the Bahamas;

— based on undisputed facts, and as a matter of law, CFC was not negligent, hence count 1 fails;

— counts 2, 3 and 4 should be dismissed because CFC owed no duty to provide a "non-defective ship";

— damages for loss of consortium are not recoverable in this action.

The following order addresses and resolves the first issue, concluding that Bahamian law should apply. As a result of this determination, further proceedings are required, as outlined below, before the court can resolve the remaining issues.

Before the court can address any substantive issues in the case, it must determine which nation's law will govern resolution of those issues. Both parties agree that the latter question is resolved by the choice of law rules supplied under U.S. General Maritime Law.

The leading case setting out choice of law rules for Maritime cases is *Lauritzen v. Larson*, 345 U.S. 571, 1953 AMC 1210 (1953). In that case the court held that Danish law governed a claim by a Danish seaman who signed aboard a Danish flag ship, owned by Danes, while in New York, and was injured while the vessel was in Havana Harbor. *Lauritzen* discussed seven discrete factors to be considered in determining which nation's law should apply. The factor given "cardinal importance" (345 U.S. at 584, 1953 AMC at 1220) was the "law of the flag." The court indicated that this factor was to be dispositive of the inquiry absent some "heavy counterweight" to be found in the other factors appropriate to consider. (345 U.S. at 586, 1953 AMC at 1222). Principal weight is given to the law of the flag both because of concerns of comity, or respect by one nation for the sovereignty of others (345 U.S. at 585, 1953 AMC at 1220-21), and to afford shipowners and operators certainty

and predictability as to which law will govern their conduct. Thus choice of law aims:

> . . . to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum.

Lauritzen, 345 U.S. at 591, 1953 AMC at 1225.

The other relevant factors mentioned in *Lauritzen* provide no "counterweight" or basis in the current case to depart from the rule that the law of the flag shall govern shipboard torts.

The objects of stability and uniformity would be undercut by giving force, in international transactions, to the *place of contract* as a major determinant of the choice of law:

> The practical effect of making the [place of contract] govern all tort claims during the service would be to subject a ship to a multitude of systems of law, [and] to put some crew [or passengers] in a more advantageous position than others . . .

345 U.S. at 588, 1953 AMC at 1223.

The *place of the wrongful act,* given significant weight, likewise would lead to lack of uniformity, unpredictability, and disparity of results. This is doubtless why the *Lauritzen* opinion gives this factor minimal weight. (345 U.S. at 583, 1953 AMC at 1219). The place of the wrongful act is not pinpointed in the present case, but it is clear that wherever it was, it was nowhere remotely near the United States. Thus this factor does not in any event militate in favor of applying U.S. law in this case.

The *allegiance or domicile of the injured* is California in this case, and thus would, if given weight, point to application of U.S. law. But giving such factor determinative weight would have precisely the effect which led the court to discount the significance of the place of contract in the passage quoted above. The sovereign law of the flag would be discounted and replaced in every instance by the law of the homeland of each plaintiff. Shipowners transporting internationally diverse groups of passengers would be potentially subjected to a multitude of different and conflicting laws. Passengers traveling on the very same ship in the very same circumstances could receive widely different recompense for identical accidents and injuries. The "stability and order" sought to be achieved, through "comity,

reciprocity, and long range interest" (345 U.S. at 582, 1953 AMC at 1218) would be undermined by such a rule.

In the present case, the court is satisfied that the domicile factor should not outweigh the law of the flag.

The *allegiance of the shipowner* is not a factor which weighs here in favor of applying U.S. law. Nor is there any suggestion in the papers that the owners of the *Ocean Pearl* have sought Bahamian registry to avoid some other more stringent law.

The *inaccessibility of the foreign forum* is not a serious consideration where, as here, the plaintiff *has* a forum (this court) and the issue is simply, what law shall this court apply? (345 U.S. at 589-590, 1953 AMC at 1225.)

The *law of the forum* is the last choice of law factor mentioned in *Lauritzen*. This court is not precisely sure what analysis this factor envisions. The *Lauritzen* opinion at one point (345 U.S. at 590, 1953 AMC at 1225) frames the argument made by the losing party in that case as nothing more than an assertion that merely because the forum court has jurisdiction, it should apply its own law. So formulated, the argument seems to defeat itself.

If, in the alternative, this factor invokes an analysis of the competing policies of the forum state and foreign states whose law might apply, such comparison as a basis for choosing law is strongly rejected in *Lauritzen* (345 U.S. at 593, 1953 AMC at 1227), as well as other more recent case law. *Hodes v. Achille Lauro,* 1988 AMC 2829, 858 F.2d 905 (3 Cir. 1988). Giving primacy to a home court determination that forum law policy is superior would turn choice of law into a raw power exercise, and squarely undercut the principles of comity and certainty and uniformity of result which underlie the purpose of choice of law.

Moreover, the temptation to elevate forum policy to a determinative choice of law role should not even arise in a case such as the present one, where the law selected under the dominant "law of the flag" rule is perfectly civilized and sensible, albeit different from forum law. The Athens Convention which is in force in the Bahamas has been adopted by numerous sophisticated and civilized nations, including the United Kingdom, the original common law country and root source of our own law. There is nothing shocking to the conscience about a $75,000 cap on liability for personal injuries. The

policy of the forum should carry major weight as a choice of law factor, if at all, only where the alternate foreign law affords no reasonable remedy, which is not the case here.

Plaintiffs urge in opposition to the motion that they cannot be bound by the provisions of Bahamian law, or the liability limitations contained therein, without reasonable communication to them, either in the ticket or otherwise, of the fact and nature of the liability limitations. Plaintiffs confuse contract doctrine with choice of law principles.

In a wide variety of contexts, parties to a contract cannot contractly relinquish legal rights they otherwise would have without conspicuous disclaimers designed to call the waivers to the attention of the weaker party. A familiar example is the requirement that disclaimers of consequential damages in commercial contracts for sale of goods must be conspicuous. These rules are designed to protect parties with weaker bargaining positions against unknowing relinquishment, by private contract, of legal rights they otherwise might have.

In the setting of steamship passage tickets, such limitations take various forms, including clauses limiting the time for notice of claims, and the time for bringing suit. Presumably these clauses shorten the times to commence suit in comparison with the statutes of limitation which may be imposed by law. Another type of clause may limit the passenger's rights by specifying that all claims will be governed by a certain country's law, and/or must be brought in the courts of that country. See, for example, *McQuillan v. Italia Societa per Azione di Navigazione*, 1975 AMC 107, 386 F.Supp. 462 (S.D.N.Y. 1974) (ticket clause provides all suits must be brought only in Italy, only under Italian law).

But waivers of legal rights by parties to private contracts are a world apart from choice of law rules which dictate application of the laws of a particular nation. A steamship company which extracts a passenger's concession of legal rights is not a sovereign nation, with sovereign powers. It is not entitled to comity. Moreover, it is presumably acting in its own self interest, extracting a waiver of rights through superior bargaining power or buried in fine print.

By contrast, there is inherent in the principles of comity the notion that other civilized nations' laws are enacted in the public interest, and entitled to hold sway within that nation's sphere of power, even

though other nations have adopted rules different from those of the forum, and predicated on different conclusions about proper public policy.

In the present case, CFC does not seek to enforce a contractual waiver of rights, either by seeking to impose a limitation of liability directly, or by specifying in the ticket that a certain country's law shall apply. There is no choice of law clause in the ticket. Nor is there any limitation of liability. Rather, the ticket simply states that CFC's liability for injury to a passenger

> "... shall not exceed that provided by law."

The limitation of liability here arises, not from any arguably unconscionable or insufficiently conspicuous *contractual waiver* of rights. Rather, it is a function of the *law* of the Bahamas, a sovereign British Common Law Nation whose laws apply by virtue of the choice of law rules laid down in *Lauritzen*.

While not necessary to the ruling on this issue, the court feels constrained to add the following note: there is nothing inherently or obviously "unfair" about this result. In an increasingly international age, it would not be reasonable for California residents who book passage between Singapore and Australia, on a Swiss owned ship, based in Paris, chartered by a French concern, registered under the Bahamian Flag, to expect that *California* law would govern any claim against the charterer. As the court in *Hodes, supra*, succinctly put it,

> American passengers do not carry American public policy on their backs wheresoever they may venture.

1988 AMC at 2845, 858 F.2d at 915.

It would be an unsophisticated and naive American traveler who honestly thought otherwise.

The court grants so much of CFC's motion as calls for application of Bahamian substantive law to decision of this case.

The remaining issues raised by the motion are not ripe for decision. Both parties have briefed those issues on the assumption that *American* law governs, citing a variety of American precedents. No authorities are cited to demonstrate what rules concerning negligence, products liability, and loss of consortium apply under Bahamian law. While the Athens Convention seems to address some

of these issues, the court would like to be satisfied that it has a complete understanding of the applicable Bahamian legal principles before attempting to master the detailed factual submissions made on the remaining issues.

Accordingly, the court requests that moving party and opposing party submit supplemental briefs on these issues. Since the court has no sense of what difficulties may be encountered in further researching Bahamian law, the court requests counsel for the parties to confer for the purpose of establishing a mutually acceptable schedule for further briefing and hearing, then submit a stipulated order memorializing the schedule.